SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 629.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

CHARLES WALTER MORELAND.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Court of Appeals of the District of Columbia.

CHARLES WALTER MORELAND, PLAINTIFF IN ERROR,
vs.
UNITED STATES. } No. 3662.

Juvenile Court.

U. S.
vs.
CHARLES WALTER MORELAND. } No. 31749.

Record and proceedings certified from Juvenile Court to Court of Appeals, D. C., under order of the Court of Appeals of May 16, 1921.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Kathryn Sellers, judge of the Juvenile Court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Juvenile Court, before you, between United States, plaintiff, and Charles Walter Moreland, defendant, No. 31749, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause
2 further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 16th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

In the Juvenile Court of the District of Columbia, April Term, 1921.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } Case No. 31749.

Information for nonsupport of minor children.

Complainant, Katie M. Moreland; attorney for def't, F. Wood.

Dec. 9, 1920. Affidavit filed and summons issued for December 16, 1920.

Dec. 16, 1920. Continued subject to call by corporation counsel.

Jan. 11, 1921. Both summoned to appear Jan. 14, 1921.

Jan. 14, 1921. Case continued to Jan. 18, 1921, by corporation counsel.

Jan. 18, 1921. Information filed. Case set for trial on January 20, 1921.

Jan. 20, 1921. Case called. Demurrer and motion to quash filed by attorney for defendant. Defendant arraigned. Plea not guilty entered. Jury trial demanded. Case continued to January 31, 1921, for trial.

Jan. 31, 1921. Case continued to February 3, 1921, at 2 p. m.

Feb. 3, 1921. Continued to February 14, 1921.

Feb. 14, 1921. Continued to February 21, 1921.

Feb. 21, 1921. Demurrer and motion to quash overruled. Exception noted. Jury impanelled and sworn. Testimony taken. Verdict of guilty returned by jury. Case continued to March 3, 1921, for sentence.

Feb. 24, 1921. Motion for new trial filed by attorney for defendant. Denied. Exception noted.

3 Mar. 3, 1921. Continued to Mar. 7, 1921.

Mar. 7, 1921. Continued to Mar. 8, 1921.

Mar. 8, 1921. Adjudged that imposition of sentence be suspended on condition defendant pay $30.00 a month for one year commencing Mar. 20, 1921, thru clerk of court to Katie M. Moreland for support of minor children. Notice of application for writ of error given by attorney for defendant. Bond fixed at $50.00. Bond $50.00, George W. Ray, surety, given by defendant.

Mar. 10, 1921. Bill of exceptions signed and filed.

Mar. 14, 1921. Motion to insert matter in bill of exceptions filed by attorney for defendant. Motion to strike certain matters from bill of exceptions filed by attorney for defendant. Hearing set for Mar. 16, 1921.

Mar. 16, 1921. Argument submitted. Motion to insert matter in bill of exceptions granted. Written order made by court amending bill of exceptions. Motion to strike certain matters from bill of exceptions denied.

Apr. 6, 1921. Notice from Court of Appeals received and filed, that petition for writ of error was this day denied.

Apr. 15, 1921. Case set for April 18, 1921.

Apr. 18, 1921. Summons for defendant returned "not found." Bond $50.00 given on March 8, 1921, George W. Ray, surety, forfeited. Case continued to April 19, 1921.

Apr. 19, 1921. Defendant and bondsman present. Order of April 18, 1921, forfeiting bond set aside. Order of March 8, 1921, not having been complied with, defendant sentenced to be committed to the workhouse at hard labor for six months, the superintendent of the workhouse to pay to Katie M. Moreland for the support of the two minor children a sum equal to fifty cents for each day's hard labor performed by defendant. Exception noted, and notice given of intention to apply for writ of error. Bond fixed at $1,000.00. Bond $1,000.00, George W. Ray, surety, filed by defendant.

Apr. 21, 1921. Bill of exceptions signed and filed.

May 16, 1921. Order of Court of Appeals of this date directing that record and proceedings be certified to that court within fifteen days, received and filed.

True copy.
Teste:

[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

4 Filed Dec. 9, 1920. Clerk Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MOORELAND. } No. —.

Affidavit of complainant.

DISTRICT OF COLUMBIA, *ss:*

Katie Mattanah Mooreland being first duly sworn on oath deposes and says that on the 1st day of February A. D. 1920, at the District

aforesaid, one Charles Walter Mooreland the father of two certain children, to wit: Ethel and Catherine Mooreland under the age of sixteen, to wit, thirteen and eight years of age, respectively, the said wife and said children being in destitute and necessitous circumstances, did then and there, without just cause, desert and willfully neglect and refuse and has ever since neglected and refused to provide for the support and maintenance of said wife and said children; against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

(Signed) KATIE MATTANNAH MORELAND.

Subscribed and sworn to before me this 9 day of December, A. D. 1920.

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

True copy.
Teste:
[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

(Endorsed:) No. 31749. United States vs. Charles Walter Mooreland, 513 F Street, NW. Affidavit charging nonsupport of minor children. Witnesses: Mrs. Katie M. Mooreland, 1406 10th St. NW. Filed Dec. 9, 1920. Clerk, Juveline Court, D. C.

5 Filed Jan. 18, 1921. Clerk Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia, January Term, A. D. 1921.

DISTRICT OF COLUMBIA, *ss:*

Francis H. Stephens, Esquire, corporation counsel in and for District of Columbia, who, for the said United States, prosecutes in this behalf, by Lewis B. Perkins, Esquire, his assistant, comes here into court, at the District aforesaid, on the 18th day of January, in the year of our Lord one thousand nine hundred and twenty-one, in this said term, and for the said United States, gives the court here to understand and be informed, on the oath of one Katie Mattanah Moreland.

2. That Charles Walter Moreland, late of the District aforesaid, on the 1st day of February, in the year of our Lord one thousand nine hundred and twenty, and on divers other days and times since said date and the date of filing this complaint, with force and arms, at the District aforesaid, and within the jurisdiction of this court, being then and there the father of two minor children, Ethel and Catherine Moreland, under the age of sixteen years, to wit, thirteen

and eight years of age, respectively, did, without just cause wilfully neglect to provide for the support and maintenance of said children, said children being in necessitous circumstances and domiciled in the District of Columbia, against the form of the statute in such case made and provided and against the peace and Government of the United States of America.

Whereupon, the said corporation counsel, who in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the court here in the premises, and that due proceedings may be had against the said Charles Walter Moreland in this behalf to make him answer to the said United States touching and concerning the premises aforesaid.

FRANCIS H. STEPHENS,
Corporation Counsel in and for the District of Columbia.
(Signed) By LEWIS B. PERKINS,
His said Assistant.

Personally appeared Katie Mattanah Moreland before me this 18th day of January, A. D. 1921, and being duly sworn according to law, doth declare and say that the facts as set forth in the foregoing information are true.

[Seal of the Juvenile Court of the District of Columbia.]
(Signed) LUCILE DRISCOLL,
Deputy Clerk, Juvenile Court of the District of Columbia.

True copy.
Teste:

WALDO BURNSIDE,
Clerk, Juvenile Court, D. C.

6 (Endorsed:) No. 31749. United States vs. Charles Walter Moreland, 513 F St. NW. Nonsupport of wife and minor children. Witnesses: Mrs. Katie M. Moreland, 1406 10th St. NW. Phone M. 1054. wks. house N. 9802. Filed Jan. 18, 1921. Clerk, Juvenile Court, D. C.

Filed Jan. 20, 1921. Waldo Burnside, clerk, Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
CHARLES WALTER MORELAND. } Information No. —.

Demurrer.

Now comes the defendant, Charles Walter Mooreland and demurs to the information herein, and for cause of demurrer says that the said information does not allege facts sufficient to constitute an offense against the law, and the said information is bad in substance.

FOSTER WOOD,
Attorneys for Defendant.

Memorandum.

The questions of law to be argued upon the hearing of the above demurrer are that the said information does not allege facts sufficient to constitute an offense, or to sustain the charge alleged.

True.

Teste:

[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk, Juvenile Court, D. C.

7 Filed Jan. 20, 1921. Waldo Burnside, Clerk Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
CHARLES WALTER MORELAND. } Information No. —.

Motion to quash.

Now comes the defendant Charles Walter Mooreland and moves the court to quash the information herein, for the reason that the said information is vague, uncertain, and indefinite.

FOSTER WOOD,
Attorneys for Defendant.

True copy.

Teste:

[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

Filed February 24, 1921. Clerk Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
CHARLES W. MORELAND. } No. 31749.

Motion for a new trial.

Now comes the defendant and moves the court to grant a new trial herein for the following reasons:

1. Because of errors committed by the court in the admission and exclusion of evidence.

2. Because of the error committed by the court in the refusal of the 1st six instructions prayed by the defendant.

3. Because of the error committed by the court in the overruling of the motion for a directed verdict of not guilty.

4. Because of error committed in the charge of the court to the jury.

8 5. Because the verdict is contrary to both the law and the evidence.

FOSTER WOOD,
Attorney for Defendant.

True copy.
Teste:

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

Filed Mar. 8, 1921. Clerk Juvenile Court, D. C.

Recognizance.

In the Juvenile Court of the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } Case No. 31749.

Charles Walter Moreland, defendant, and George W. Ray surety, acknowledge themselves to be indebted to the United States, in the sum of fifty dollars, lawful money of the United States, to be levied on their and each of their goods and chattels, lands and tenements, upon condition nevertheless, that in the event of a denial by the Court of Appeals of the District of Columbia, of his application for a writ of error, he will, within five days next after the expiration of ten days from March 8, 1921, annear in said Juvenile Court and abide by and perform its judgment, and that in the event of the granting of such writ of error he will appear in the said Court of Appeals and prosecute the writ of error and abide by and perform its judgment in the premises, then this recognizance to be void and of no effect.

C. W. MORELAND. [SEAL.]
GEORGE W. RAY. [SEAL.]

Approved, this 8th day of March in the year of our Lord, one thousand nine hundred and twenty-one.

KATHRYN SELLERS,
Judge Juvenile Court, D. C.

Acknowledged in open court before me this 8th day of March, 1921.
[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, District of Columbia.

True copy.
Teste:
[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juv. Ct. D. C.

9 Filed Mar. 10, 1921. Clerk Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } No. 31749.

Bill of exceptions.

Be it remembered that upon the trial of this case upon the 21st day of February, 1921, before a jury in the Juvenile Court of the District of Columbia, to maintain the issue upon its part joined the United States produced the following evidence and the following proceedings were had.

The defendant filed a motion to quash and a demurrer, which motion to quash is in the following:

"Now comes the defendant Charles Walter Moreland and moves to quash the information herein for the following reasons: That the information is vague, uncertain, and indefinite."

And upon consideration thereof the court overruled the said motion to quash for the reason that the said information, a certified copy of which is attached hereto and made a part hereof, and marked "Exhibit 1," was the printed form of information in use in the Juvenile Court of the District of Columbia for many years, and upheld and approved by former judges on this bench, and to which action and ruling of the court the defendant duly noted an exception.

And thereupon the defendant filed his demurrer to the information herein, which is in the following:

"Now comes the defendant, Charles Walter Moreland, and demurs to the information herein, and for cause of demurrer says that the said information does not allege facts sufficient to constitute an offense against the law, and the said information is bad in substance."

And upon consideration whereof the court overruled the said demurrer for the same reason given above for overruling the motion to quash, and to which action and ruling of the court the defendant duly noted an exception.

And thereupon to maintain the issue upon its part joined, the United States introduced one Katie Moreland, who testified that the defendant was her husband, that in 1912 she had left him, taking her two children of whom the defendant is the father, that since that time the said children had been supported in part by her father and in part by herself, and that the defendant has never contributed an amount sufficient for their support; that since February 1st,

10 1920, the defendant has not contributed anything whatever to the support of the children. That one of the children was eight years old and the other child thirteen years old. That for the past three years she and her children and the defendant have been and are now residents of the District of Columbia. That she is now employed by Pullman and Company in this city. That the last time

she received any money from him was in January, 1920. That in 1912 she applied for a divorce in Fairfax County, Virginia, at which time she and her two children and the defendant were residents of that State. That for reasons unknown to her the cause for divorce in 1912 did not come on to be heard until December, 1920, at which time, namely, on December 5th, a decree of absolute divorce was granted her.

Cross-examination:

On cross-examination the witness testified that she had left defendant's home, which was a six-room house, and had not returned to him. That she is now supporting the children. She was then asked if she had signed an affidavit, a copy of which was shown to her, and she testified she had, whereupon counsel for the defendant introduced the said affidavit for the purpose of impeaching the witness. The assistant corporation counsel then asked to inspect the said affidavit, a certified copy of which is attached hereto and made a part hereof and marked "Exhibit No. 2." Whereupon he informed the court that it was his own oversight in preparing the affidavit for the signature of Mrs. Moreland not to have stricken out all of the superfluous words in the printed form contained in the third and fifth lines above the signature, the words being "the said wife and," but that the affidavit he believed was correct in detail; whereupon the court excluded the affidavit for the purpose for which it was offered, and stated in the presence of the jury that it would be an injustice to allow an incorrect statement which was the result of a clerical error that had escaped the notice of the witness to operate as a basis for impeachment, and to which action and ruling of the court the defendant duly noted an exception. The witness was shown a copy of a letter dated December 23rd, 1912, addressed to her and she testified that she did not know whether or not she had received such a letter, which letter was later identified by the defendant and introduced in evidence as part of the defendant's case in chief, to which the assistant corporation counsel objected for the reason that no notice to produce the original letter has been served on the State, which objection the court overruled, whereupon the letter was admitted in evidence. Whereupon the witness testified that for the past three years she and her children and the defendant have been and are now residents of the District of Columbia. That she is now employed by Pullman and Company in this city. That the last time she received any money from him was in January, 1920. That in 1912 she applied for a divorce in Fairfax County, Virginia, at which time she and her two children and the defendant were residents of that State. That for reasons unknown to her the cause for divorce in 1912 did not come on to be heard until Decem-
11 ber, 1920, at which time, namely, on December 5th, a decree of absolute divorce was granted her. Whereupon counsel for the defendant exhibited a certified copy of a decree of divorce obtained by the witness from the defendant, a certified copy of which is hereto

attached and made a part hereof, and marked "Exhibit No. 3," which was admitted by counsel for the Government and proof thereof waived; that the witness had secured from defendant a divorce a vincula matrimonii upon the grounds of wilful desertion. That the decree granted her the custody of the children and thirty ($30.00) dollars per month for their support until the older child shall arrive at the age of twenty-one years, and thereafter the sum of fifteen ($15.00) dollars per month until the younger child shall arrive at the age of twenty-one years, which said sum may be paid to Walter Townsend Oliver, attorney for the witness. That the defendant had not paid any money under this order.

And thereupon the District of Columbia announced its case closed in chief.

Whereupon counsel for the defendant moved the court to direct a verdict in favor of the defendant because of the insufficiency of the evidence introduced on behalf of the Government, and because the evidence failed to prove the essential elements of the crime charged, and because it appeared that a divorce had been granted unto the mother of the children from the defendant and that the court had awarded their custody to Katie Moreland and adjudged his duty toward them and that the matter was therefore res judicata; that their custody was taken from him and the rights of the respective parties adjudicated, but the court overruled the said motion to which action and ruling of the court the defendant noted an exception.

Thereupon to maintain the issue upon his part joined, the defendant was duly sworn as a witness and testified that he had maintained a home in Virginia, but that he now resides at 513 F Street Northwest, Washington, D. C. That in 1912 his wife took the children and left him; that he wrote her a letter, which letter was introduced in evidence, a certified copy of which is attached hereto and made a part hereof and marked "Exhibit No. 4." That he had retained counsel to defend the suit for divorce and an answer was filed, but his counsel did not advise him the case was coming on to be heard and he did not have an opportunity to defend the case. That he had paid her money under a temporary order of the court of Virginia, paying it to Mr. Oliver, her attorney; that he had not paid her any money since January, 1920. That he has not seen his children or known their whereabouts for the past two and a half years; that in 1920 he was employed six months. On cross-examination he admitted he had not endeavored to locate his children.

Thereupon the defense announced its case closed.

And thereupon counsel for the defendant moved the court to instruct the jury as follows:

12 Instruction No. 1.

"The court instructs the jury to return a verdict of "Not guilty."

But the court refused to grant the said instruction No. 1, to which action and ruling of the court the defendant duly noted an exception

and thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 2.

"If you find that a divorce was granted to the mother of the children from the defendant and the custody of the children was awarded to her, and that the defendant has been deprived of their custody and control, your verdict must be "Not guilty."

But the court refused to grant the said instruction No. 2, to which action and ruling of the court the defendant duly noted an exception. And thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 3.

"If you believe the defendant is willing to provide for the support of the children if he is given their custody, your verdict must be "Not guilty."

But the court refused to grant the said instruction No. 3, the defendant having made no such statement nor introduced any evidence to this effect, to which action and ruling of the court the defendant duly noted an exception. And thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 4.

"You are instructed that the law is to protect infants from suffering by reason of their not being supplied with the necessities of life, and if you find that they have been supplied with the necessary food, clothing, and shelter by the mother of the children, your verdist must be "Not guilty."

But the court refused to grant the said instruction No. 4, to which action and ruling of the court the defendant duly noted an exception. And thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 5.

"That destitute and necessitous circumstances mean to be in the necessities of life and unless the Government has established
13 the fact to be that the children of the defendant were without necessary food, clothing, or shelter, your verdict should be "Not guilty."

But the court refused to grant the said instruction No. 5, to which action and ruling of the court the defendant duly noted an exception. And thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 6.

"The court instructs the jury that if you find the defendant's children are in destitute and necessitous circumstances, you must further find that the defendant's failure to furnish them with necessary food, clothing and shelter was wilful; that he knew they were in destitute and necessitous circumstances, and wilfully failed to provide for them."

But the court refused to grant the said instruction No. 6, to which action and ruling of the court the defendant duly noted an exception. And thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 7.

"The court instructs the jury that before they can find the defendant guilty they must be satisfied beyond a reasonable doubt of his guilt; the circumstances must be such that will lead the guarded discretion of a reasonable man to the conclusion that the offense has been committed and that circumstances must be so cogent as to exclude every reasonable hypothesis except that of guilt. If the facts shown can be reconciled with innocence, they are insufficient to sustain a conviction."

which said instruction the court granted.

And thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 8.

"The court instructs the jury that upon the trial of a criminal case by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of "Guilty." Each juror should feel the responsibility resting upon him as a member of the jury, and should realize that his own mind must be convinced beyond a reasonable doubt of the defendant's guilt before he can consent to a verdict of "Guilty." Therefore, if any individual member of the jury, after having duly considered all the evidence in this case and after consultation with his fellow jurors should entertain such reasonable doubt of defendant's guilt, it is his duty not to surrender his own conviction simply because the balance of the jury may entertain different convictions."

14 which said instruction No. 8 the court granted.

And thereupon the defendant requested the court to instruct the jury as follows:

Instruction No. 9.

"The court instructs the jury that the defendant at the outset of this trial is presumed to be an innocent man. He is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering the testimony in this case, you must look at that testimony and view it in the light of the presumption with

which the law clothes the defendant, that he is innocent, and it is a presumption which abides with him throughout the trial of the case until the evidence convinces you of his guilty beyond a reasonable doubt and to a moral certainty. The presumption of innocence prevails throughout the trial and it is the duty of the jury, *of* possible, to reconcile the evidence with this presumption."

which said instruction No. 9 the court granted, after striking out the words "And to a moral certainty," at the end of the third sentence.

And thereupon the defendant requested the court to grant the following instruction:

Instruction No. 10.

"The court instructs the jury that upon the trial of this case, if a reasonable doubt of any fact necessary to establish the guilt of the accused as charged in the information be raised by the evidence, or lack of evidence, such doubt is decisive, and the jury must acquit the accused, since a verdict of "Not guilty," means no more that the guilt of the accused has not been established in the precise, specific and narrow form prescribed by law."

which said instruction No. 10 the court granted.

The court then instructed the jury that this was a proceeding between the United States and the defendant for the support of the children, to which instruction the defendant duly noted an exception.

The court further instructed the jury that the defendant must be proven to have without just cause failed to have supported the children in destitute and necessitous circumstances.

And thereupon the defendant requested the court to instruct the jury as to what constituted necessitous circumstances, which request was refused, for the reasons that the court had already ruled that "destitute and necessitous circumstances" need not necessarily mean that the child is naked and starving and without shelter, as it would manifestly be against public policy to permit such a condition to exist, to which action and ruling of the court the defendant duly noted an exception.

And the court hereby certifies that the foregoing is in substance the evidence upon the questions to which exceptions were duly noted, introduced by both the United States and the defendant upon the trial of the case, upon which the jury rendered a verdict of "Guilty."

The defendant now tenders this his bill of exceptions herein, and prays that the same be signed and sealed, enrolled and made a part of the record in this case nunc pro tunc, the 10th day of March, 1921, which is accordingly done.

[Seal of the Juvenile Court of the District of Columbia.]

(Signed) KATHRYN SELLERS,
Judge Juvenile Court, D. C.

True copy.
Test: WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

"EXHIBIT 3."

In the Circuit Court of Fairfax County, Virginia, November term, 1920.

KATIE MATTANAH MORELAND, COMPLAINANT,
versus
CHARLES WALTER MORELAND, DEFENDANT.

Final decree.

This cause coming on again to be heard on this thirtieth day of November, 1920, on the papers formerly read, the depositions of Katie Mattanah Moreland and Walter Tancill Oliver, duly taken and subscribed and sworn to in behalf of the complainant, and argument of counsel, upon consideration whereof, it appearing to the court that the said Katie Mattanah Moreland, complainant, and Charles Walter Moreland, defendant, were legally married on the twenty-ninth day of December, 1904; that the said Charles Walter Moreland, defendant, wilfully deserted and abandoned the said Katie Mattanah Moreland, complainant, on the fourth day of December, 1912, and has not since returned to her or had any marital relations whatsoever with the said complainant; that the said Katie Mattanah Moreland, complainant, has been a legal resident of and actually domiciled in the county of Fairfax and the State of Virginia for the period of more than one year prior to the institution of this suit; and that a decree was entered by this court at its September term, 1920, granting unto the said complainant a divorce a mensa et thoro (from bed and board) from the said said defendant; and it further appearing to the court from satisfactory evidence, that the said desertion and abandonment has continued uninterruptedly for more than the statutory period of three years and also since the date of the former decree and that the said complainant and the said defendant have not since resumed marital relations and that there
16 is no hope of any reconciliation between the said parties:

Upon consideration whereof, the court does hereby adjudge, order, and decree that the said Katie Mattanah Moreland, complainant, be, and she is hereby, granted a divorce a vinculo matrimonii (from the bond of matrimony) from the said Charles Walter Moreland, defendant, on the ground of wilful desertion and abandonment, continuing uninterruptedly for more than the statutory period of three years; and that the bond of marriage between the said parties be and the same is hereby in all things dissolved and annulled to the same effect as if the same had never been entered into between them.

The court does hereby further adjudge, order, and decree that the said Charles Walter Moreland, defendant, be and is hereby required to pay to the said Katie Mattanah Moreland, complainant, the sum of thirty dollars per month until the older child shall arrive at the

age of twenty-one years, and thereafter the sum of fifteen dollars per month until the younger child shall arrive at the age of twenty-one years, which said sums may be paid to Walter Tansill Oliver, solicitor and attorney for the complainant, and shall be paid between the first and fifth days of each month, and shall be used by the said complainant toward the maintenance and support of the two children who were born of the marriage between the said parties.

It is hereby further adjudged and ordered and decreed that neither one of the said parties shall marry again until the expiration of the period of six months from the entry of this decree, towit, until the thirtieth day of June, 1921. And the clerk of this court is hereby directed to dismiss this suit from the active docket and to place the same on the final docket of this court.

And this decree is final.

A copy test:

F. W. RICHARDSON, *Clerk.*

Fairfax, Va., Jany. 18, 1921.

True copy.

Teste:

[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

"EXHIBIT 4."

HERNDON, VA., *Dec. 23/12.*

DEAR MATTIE: Since you have deserted me it has become necessary for me to close my house. It is impossible for me to attend to my business & keep my house open. I write to give you notice that I shall be compelled to take this course if you persist in remaining away from me. I have always been ready & willing to provide a home & support for you & the children. I have a right to
17 expect you to perform your duty as a wife, & can assure you that whenever you wish to do so, I am ready to provide the home & support.

——— ———.

MARCH 10TH, 1921.

I hereby certify under seal of this court that this — a true copy of the letter introduced by the defendant as evidence in the case of U. S. vs. Moreland, #31749.

[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

In the Juvenile Court for the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } No. 31749.

Motion.

Now comes the defendant by his attorney, Foster Wood, and moves the court to insert in and make a part of the bill of exceptions the following, which the attorney for the Government and your honor agree took place at the trial of the said cause:

"The COURT. Has he paid the alimony awarded in the decree?

"Mr. WOOD. That is not an issue in this case and I object to the question.

"The COURT. For my own information as it would affect my sentence if he is found guilty.

"Mr. WOOD. Pending these proceedings I have advised my client not to pay any money to Mrs. Moreland.

"The COURT. If action is taken to compel him to pay the money ordered by the Virginia court to be paid will you fight the case?

"Mr. WOOD. I do not know at present."

(Signed) FOSTER WOOD,
Attorney for Defendant.

True copy.
Teste:
[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

18 Filed Mar. 14, 1921. Clerk Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } No. 31749.

Motion.

Now comes the defendant by his counsel, Foster Wood, and moves the court to strike out of the bill of exceptions filed herein the following words and sentences, which words and sentences have been inserted by the court without the consent of counsel for the defendant:

(1) "Temporary." This word is on the 4th page of the bill of exceptions, 2nd paragraph, and is contained in the sentence which

reads "that he has paid her money under a temporary order of the court of Virginia," etc.

(2) "On cross-examination he admitted he had not endeavored to locate the children," which sentence is contained on the 4th page of the bill of exceptions and immediately precedes the paragraph which reads:

"And thereupon the defense announced its case closed."

(3) "The court further instructs the jury that the defendant must be proven to have without just cause failed to support the children in destitute and necessitous circumstances," which sentence is contained in the court's charge to the jury.

(4) "That the defendant has not paid any money under this order," which sentence is the last sentence on page 3 of the bill of exceptions and precedes the following words, "and thereupon the District of Columbia announced its case closed in chief."

FOSTER WOOD,
Attorney for Defendant.

True copy.
Teste:
[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

19 In the Juvenile Court for the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } No. 31749.

Order.

The motion filed by attorney for defendant on March 14, 1921, to amend bill of exceptions by inserting matter not included coming on to be heard this day, and argument thereon being submitted, the motion was granted, and it is this 16th day of March, 1921,

Ordered that the bill of exceptions in this case signed and filed on March 10, 1921, be amended by inserting the following between the words "employed six months." and "On cross-examination" on the twelfth line from the bottom of page 4:

"The COURT. Has he paid the alimony awarded in the decree?"

"Mr. WOOD. That is not an issue in this case and I object to the question."

"The COURT. For my own information as it would affect my sentence if he is found guilty."

"Mr. WOOD. Pending these proceedings I have advised my client not to pay any money to Mrs. Moreland."

"The COURT. If action is taken to compel him to pay the money ordered by the Virginia court to be paid will you fight the case?"

"Mr. Wood. I do not know at present."
Whereupon the witness testified.

KATHRYN SELLERS,
Judge Juvenile Court, D. C.

True copy.
Teste:

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

Filed Apr. 19, 1921. Waldo Burnside, clerk Juvenile Court, D. C.

Recognizance.

In the Juvenile Court of the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } Case No. 31749.

Charles Walter Moreland, defendant, and George W. Ray, surety, acknowledge themselves to be indebted to the United States, in
20 the sum of one thousand dollars, lawful money of the United States, to be levied on their and each of their goods and chattels, lands and tenements, upon condition, nevertheless, that in the event of a denial by the Court of Appeals of the District of Columbia of his application for a writ of error, he will, within five days next after the expiration of ten days from April 19, 1921, appear in said Juvenile Court and abide by and perform its judgment, and that in the event of the granting of such writ of error he will appear in the said Court of Appeals and prosecute the writ of error and abide by and perform its judgment in the premises, then this recognizance to be void and of no effect.

CHARLES WALTER MORELAND. [SEAL.]
G. W. RAY. [SEAL.]

Approved, this 19th day of April in the year of our Lord one thousand nine hundred and twenty-one.

KATHRYN SELLERS,
Judge Juvenile Court, D. C.

Acknowledged in open court before me this 19th day of April, 1921.

WALDO BURNSIDE,
Clerk Juvenile Court, District of Columbia.

True copy.
Teste:
[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

Filed Apr. 21, 1921. Waldo Burnside, clerk Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

UNITED STATES
vs.
CHARLES WALTER MORELAND. } No. 31749.

Bill of exceptions.

Be it remembered that upon the 21st day of February, 1921, before a jury in the Juvenile Court of the District of Columbia, in re United States vs. Charles Walter Moreland, No. 31749, the defendant in the before-mentioned case was found guilty of nonsupport of his two children, one eight years old and the other thirteen years old. That upon exceptions duly noted, a bill of which exceptions is annexed hereto and made a part hereof and is to be found as
21 Exhibit 1 attached hereto, the defendant petitioned the Court of Appeals of the District of Columbia for a writ of error in the above mentioned case.

That upon March 8, 1921, the defendant with his counsel appeared before the court and imposition of sentence was suspended and an order made by the court directing that the defendant pay a sum amounting to thirty dollars a month for the support of his children for one year, beginning March 20, 1921.

That no exception was taken to this judgment of the court.

That a supersedeas bond was allowed in the sum of fifty dollars, which bond was signed by the defendant, Charles W. Moreland, and Mr. George W. Ray, a certified copy of which bond is attached hereto and made a part hereof, and is to be found as Exhibit 2.

That upon April 6, 1921, the Court of Appeals denied the petition of the defendant for a writ of error in the above mentioned case.

That upon April 15, 1921, neither the defendant nor his surety having appeared to deliver the defendant up to the court under the terms of supersedeas bond granted for the purpose of appeal, a summons was issued for a hearing in the case on April 18, 1921, to the last address of defendant and the surety, Mr. George W. Ray, was notified by telephone by the clerk of the court that the case would be called on that day.

That upon the case being called for hearing on Monday, April 18, 1921, neither the surety nor the defendant appeared and the bond was declared forfeited. That upon the day following the defendant, his counsel and surety, appeared in open court, and the court, having previously ascertained from the clerk of the court that no money had been paid through the court by the defendant under the terms of the suspended sentence, thereupon sentenced the defendant to be committed to the workhouse, the superintendent of the workhouse to pay to Katie M. Moreland for the support of the two minor children a sum equal to fifty cents per day for each day's hard labor performed by defendant.

The defendant objected to the imposition of the sentence, which objection the court overruled, and to which action and ruling of the court the defendant then and there duly noted an exception.

Counsel for the defendant having noted appeal from the sentence passed April 19, 1921, requested a supersedeas bond and this bond was fixed in the sum of one thousand dollars, for the reason that the defendant had, in fact, forfeited the bond upon which the previous supersedeas had been granted by not appearing with his surety within five days after the denial of the writ of error, according to the contract of the bond, and delivering himself up.

The court thereupon asked the defendant, Moreland, whether or not he had paid any money for the support of his children since the court order was passed on March 2, 1921, or whether he had paid any money as directed by the court when he was last before it. That thereupon counsel for the defendant refused to allow defendant to answer the question.

The court then asked counsel whether the defendant had paid any money under the order and counsel replied that he did not
22 know whether his client had paid any money under the order or not. Whereupon the court directed the clerk of the court to administer the oath to counsel, and the court then asked counsel whether his client had paid any money under the court order. Counsel replied that he did not know whether his client had paid any money under the order. Whereupon the court again asked the defendant whether he had paid any money under the court order and the defendant stood mute. The court then asked the clerk whether in his capacity as clerk of the court he could state whether the defendant had paid any money under the court order. The clerk of the court stated that no money had been received from the defendant by the court.

The court again stated that the defendant was sentenced to six months in the workhouse of the District of Columbia at hard labor, the superintendent of the workhouse to pay to Katie M. Moreland as trustee for the support of the two minor children a sum equal to fifty cents per day for each day's hard labor performed by defendant.

That this sentence was passed under the original conviction of the defendant of February 21, 1921.

That counsel for the defendant thereupon noted an exception to the sentence of the court on the ground that no trial was this day had, that the sentence of the court passed on March 8, 1921, suspending sentence on condition that defendant pay a sum amounting to thirty dollars a month, was null and void and of no effect, the law providing that the money should be paid weekly.

The court thereupon stated that the Court of Appeals had already passed upon the proceedings in the trial at which the defendant had been convicted of nonsupport of his two children and that this trial and conviction which were had on February 21, 1921, were the trial and conviction upon which the sentence of commitment to the workhouse was this day passed.

Counsel for the defendant thereupon stated that the clerk of the Court of Appeals had told him that the reason the writ of error in the above mentioned case had been denied was that no final judgment had been had in the case, that the clerk of the Court of Appeals had consulted with the Justice of the Court of Appeals who had rendered the decision in the case on appeal and that this Justice had told the clerk and the clerk had told defendant's counsel that the reason the writ was refused was because there had been no final judgment.

Counsel for the defendant having noted appeal from the sentence passed April 19, 1921, requested a supersedeas bond and this bond was fixed in the sum of one thousand dollars, for the reason that the defendant had, in fact, forfeited the bond upon which the previous supersedeas had been granted by not appearing with his surety within five days after the denial of the writ of error, according to the contract of the bond, and delivering himself up.

Upon request of the surety, Mr. George W. Ray, the court set aside the order of April 18, 1921, declaring the bond forfeited.

23 A copy of the docket in the above mentioned case is attached hereto and made a part hereof, and marked exhibit #3.

And the court hereby certifies that the foregoing is a substance of the evidence upon the questions to which exceptions were duly taken, introduced by both the United States and the defendant upon the trial of this case on the 19th day of April, 1921.

The defendant now tenders this, his bill of exceptions herein and prays that the same may be signed, sealed and enrolled, and made a part of the record of this case nunc pro tunc, this 21st day of April, 1921, which is accordingly done.

KATHRYN SELLERS.
Judge, Juvenile Court, D. C.

Teste:
True copy.

[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE.
Clerk, Juvenile Court, D. C.

In the Juvenile Court of the District of Columbia.

MAY 26TH, 1921.

I hereby certify under the seal of this court that the foregoing, being comprised in twenty-six pages, is a true copy of the record of all proceedings had in the Juvenile Court of the District of Columbia in the case of United States vs. Charles Walter Moreland, No. 31749.

[Seal of the Juvenile Court of the District of Columbia.]

WALDO BURNSIDE,
Clerk Juvenile Court, D. C.

(Endorsed on cover:) District of Columbia Juvenile Court. No. 3662. Charles Walter Moreland, plaintiff in error, vs. United States. Court of Appeals, District of Columbia. Filed May 28, 1921. Henry W. Hodges, clerk.

24 Friday, October 7th, A. D. 1921.

CHARLES WALTER MORELAND, PLAINTIFF IN ERROR,
vs.
UNITED STATES. } No. 3662.

The argument in the above entitled cause was commenced by Mr. Foster Wood, attorney for the plaintiff in error, and was continued by Mr. L. B. Perkins, attorney for the defendant in error, and was concluded by Mr. F. H. Stephens, attorney for the defendant in error.

25 In the Court of Appeals of the District of Columbia.

CHARLES WALTER MORELAND, PLAINTIFF IN ERROR,
vs.
UNITED STATES. } No. 3662.

Opinion.

Mr. Justice ROBB delivered the opinion of the court:

This is a writ of error to the Juvenile Court of the District of Columbia and brings up for review a judgment in that court under which the plaintiff in error, without indictment or presentment by a grand jury, was sentenced to the workhouse at hard labor for six months, for wilfully neglecting or refusing to provide for the support and maintenance of his minor children (see 34 Stat., 86). The single question necessary to be considered by us is whether the Juvenile Court has jurisdiction to impose a sentence involving hard labor where there has been no indictment or presentment by a grand jury, as provided by the fifth amendment to the Constitution.

In Wong Wing vs. United States, 163 U. S., 228, Wing had been sentenced to the house of correction at hard labor for a period of sixty days, and the court expressly held that imprisonment at hard labor constituted an infamous punishment and that such imprisonment could be imposed only where there had been a compliance with the Constitution. We see no escape from the conclusion that the decision in that case is controlling in this, and we therefore reverse the judgment and remand the case with directions to dismiss the complaint.

Reversed and remanded.

26 Monday, November 7th, A. D. 1921.

CHARLES WALTER MORELAND, PLAINTIFF IN error, *vs.* UNITED STATES.	October Term, 1921. No. 3662.

In error to the Juvenile Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Juvenile Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Juvenile Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Juvenile Court with directions to dismiss the complaint.

Per Mr. JUSTICE ROBB.

NOVEMBER 7, 1921.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the Juvenile Court of the District of Columbia, greeting:

Whereas lately in the Juvenile Court of the District of Columbia, before you or some of you, in a cause between United States, plaintiff, and Charles Walter Moreland, defendant, information No. 31749, wherein the judgment of the said Juvenile Court entered in said cause on the 19th day of April, A. D. 1921, is in the following words, viz:

Defendant and bondsman present. Order of April 18, 1921, forfeiting bond set aside. Order of March 8, 1921, not having been complied with, defendant sentenced to be committed to the workhouse at hard labor for six months, the superintendent of the workhouse to pay to Katie M. Moreland for the support of the two minor children a sum equal to fifty cents for each day's hard labor performed by defendant. Exception noted, and notice given of intention to apply for writ of error. Bond fixed at $1,000.00. Bond $1,000.00, George W. Ray, surety, filed by defendant.

28 as by the inspection of the transcript of the record of the said Juvenile Court, which was brought into the Court of Appeals of the District of Columbia by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

29 And whereas in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Juvenile Court in this cause be, and the same is hereby, reversed, and that this cause be, and the

same is hereby remanded to the said Juvenile Court with directions to dismiss the complaint.

November 7, 1921.

30 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Constantine J. Smyth, Chief Justice of said Court of Appeals, the 7th day of November, in the year of our Lord one thousand nine hundred twenty-one.

(Signed) HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsed:) Court of Appeals of the District of Columbia. No. 3662, October Term, 1921. Charles Walter Moreland, plaintiff in error, *vs.* United States. Mandate.

31 In the Court of Appeals of the District of Columbia.

CHARLES W. MORELAND, APPELLANT,
vs. No. 3662.
UNITED STATES, APPELLEE.

Stipulation.

It is hereby stipulated by counsel for appellant and counsel for appellee that on Monday, the 14th day of November, 1921, Foster Wood, counsel for appellant, presented Charles W. Moreland to the Juvenile Court of the District of Columbia, and requested that he be discharged in conformity with the mandate of the Court of Appeals of the District of Columbia, which had therefore been sent to the Juvenile Court of the District of Columbia, by the Court of Appeals, reversing the judgment of the Juvenile Court, and ordering the petitioner discharged. That Judge Katherine Sellers, judge of the Juvenile Court of the District of Columbia, refused to discharge the appellant, Charles W. Moreland, in accordance with the mandate of the Court of Appeals of the District of Columbia.

It is further stipulated that the above be made a part of the record in the above-entitled cause, and that it be inserted in the designation of record as No. 5A.

Signed this 22d day of November, 1921.

FOSTER WOOD,
Attorney for Plaintiff in Error.
F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,
Attorneys for Defendant in Error.

(Endorsed:) No. 3662. Moreland v. United States. Stipulation. Court of Appeals. District of Columbia. Filed November 22, 1921. Henry W. Hodges, clerk.

32 In the Court of Appeals of the District of Columbia.

CHARLES W. MORELAND
vs.
THE UNITED STATES. } Court of Appeals No. 3662.

Now comes the appellee, by its attorney, and moves the court to recall its mandate of November 7th, 1921, reversing the judgment of the Juvenile Court and remanding the case with directions to dismiss the complaint, and to amend the said mandate so as to send the said cause back to the said Juvenile Court for such further proceedings, if any, as the said Juvenile Court may deem proper, not inconsistent with the opinion.

F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,
Attorneys for Appellee.

Memorandum.

For grounds of the foregoing motion appellee shows to the court as follows:

That the provision for punishment of the offense of nonsupport as contained in the act of March 23rd, 1906, 34 Stat., 86, is as follows:

"And on conviction thereof shall be punished by a fine of not more than $500 or by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelve months or by both such fine and imprisonment;"

That said provision contains, as indicated, three severable penalties or punishments, each independent of the other, and any one of which may be imposed without reference to the other.

The fact that the Juvenile Court does not have power to impose the penalty or punishment involving imprisonment at hard labor
33 does not affect its power to impose a punishment of a fine of not more than $500. If this be so the present mandate is broader in scope than is necessary for the decision of the issue involved, and its effect, if undisturbed, might be construed to be such as to prevent any prosecutions in the Juvenile Court under this act at all, which would work a great hardship upon dependent wives and children, and would be plainly contrary to the intent and purpose of section 8 of the act of June 18th, 1912, 34 Stat. at L., 86, expressly conferring jurisdiction upon the Juvenile Court to try such nonsupport cases, that section providing "That the Juvenile Court of the District of Columbia is hereby given * * * concurrent jurisdiction with the Supreme Court of the District of Columbia in all cases arising under the act approved March 23rd, 1906, entitled "An act making it a misdemeanor in the District of Columbia to abandon or wilfully neglect to provide for the support and maintenance by any person of his wife or of his or her minor children in destitute and necessitous circumstances."

That one portion of a statute, severable from the other, may stand and be enforced without regard to the validity or constitutionality of the other is well settled in this jurisdiction.

District of Columbia vs. Green, 29 Appeals, D. C., 296, 299.

"Without expressing any opinion as regards the validity of sec. 2, we may concede, for the purposes of this case, that it violates the principle of equality. But it does not follow that the entire act is for that reason to be declared void. The two sections are distinctly separable from, and entirely independent of each other. The first may, therefore, stand and be enforced without regard to the validity of the second."

And this principle applies not only where one section is valid and another section invalid, but also where part of a section is valid and another part invalid. In Hyde vs. Southern Railway Company, 31 Appeals, D. C., 466, 470, 471, 472, the court said as follows:

Page 470:

"Equally clear is it, generally speaking, that, where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal."

34 Page 471:

"This condition of severableness of the provisions of a statute, that may preserve the validity of one notwithstanding the repugnance of the other to the Constitution, is not dependent upon the fact that they may be found in separate sections, though this would ordinarily render the task of separation easier. It is sufficient if the separation can be accomplished by exercising a clause of the same section, and leaving the remainder complete and unchanged in meaning without reading into it another word."

Page 472:

"As thus read, the section is perfect and complete without the addition of a new word, or the slightest change in the meaning of one that has been used."

In view of these decisions and of the evident intent and purpose of Congress in enacting this law, it would seem to be possible to eliminate only the words "at hard labor," and leave a constitutional and workable law which would still be within the scope of the opinion and the relief to appellant intended thereby as disclosed by the issue involved.

Respectfully submitted.

F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,
Attorneys for Appellee.

Service acknowledged.

FOSTER WOOD.

(Endorsed:) No. 3662. Charles W. Moreland vs. United States. Motion to recall and amend mandate. Court of Appeals, District of Columbia. Filed November 9, 1921. Henry W. Hodges, clerk.

35 Thursday, November 10, A. D. 1921.

CHARLES WALTER MORELAND, PLAINTIFF IN ERROR,
vs.
UNITED STATES. } No. 3662.

On consideration of the motion to recall and amend the mandate in the above entitled cause, it is ordered by the court that said motion be and the same is hereby denied.

36 In the Court of Appeals of the District of Columbia.

CHARLES W. MORELAND,
vs.
THE UNITED STATES. } Court of Appeals. No. 3662.

Motion to recall mandate.

Now comes the appellee, by its attorneys, and moves the court to recall its mandate of November 7th, 1921, issued herein, and to hold the same in abeyance pending the determination of the application of appellee to the Supreme Court of the United States for a writ of certiorari.

F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,
Attorneys for Appellee.

Memorandum.

Although, under the statute, appellee has three months in which to file application for writ of certiorari, nevertheless it is the intention of counsel to make the application as soon as the same can be prepared and printed, which can probably be done within a week.

Respectfully submitted.

F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,

Service of a copy of the above acknowledged this 17th day of November, 1921.

FOSTER WOOD,
Attorney for Appellant.

37 (Endorsed:) Court of Appeals, No. 3662. Charles W. Moreland, *vs.* The United States. Motion to recall mandate. Court of Appeals, District of Columbia. Filed November 17, 1921. Henry W. Hodges, Clerk. F. H. Stephens, George P. Barse, attorneys for appellee.

38 Thursday November 17th, A. D. 1921.

CHARLES WALTER MORELAND, PLAINTIFF in error, vs. UNITED STATES. } No. 3662.

On consideration of the motion to recall and stay the mandate in the above-entitled cause pending application for a writ of certiorari to the Supreme Court of the United States, it is ordered by the court that said motion be and the same is hereby granted.

39 In the Court of Appeals of the District of Columbia.

CHARLES W. MORELAND, PLAINTIFF IN ERROR, vs. UNITED STATES, DEFENDANT IN ERROR. } No. 3662.

Designation of record.

To the clerk:

In making up the transcript of record in the above-entitled case, please include therein the following:

1. Transcript of record.
2. Argument of case.
3. Opinion.
4. Judgment.
5. Mandate.
5A. Stipulation.
6. Motion to recall and amend mandate.
7. Order denying motion to recall and amend mandate.
8. Motion to recall and stay mandate.
9. Order granting motion to recall and stay mandate.
10. And this designation.

F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,
Attorneys for Defendant in Error.

(Endorsed:) No. 3662. Charles W. Moreland vs. United States. Designation of record. Court of Appeals. District of Columbia. Filed November 19, 1921. Henry W. Hodges, clerk.

40 Court of Appeals of the District of Columbia.

I, HENRY W. HODGES, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 39 constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of Charles Walter Moreland,

plaintiff in error, vs. United States, No. 3662, October term, 1921, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 22nd day of November, A. D. 1921.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Court of Appeals of the District of Columbia, greeting:

Being informed that there is now pending before you a suit in which Charles Walter Moreland is plaintiff in error and The United States is defendant in error, No. 3662 (No. 16, Special Calendar), which suit was removed into the said Court of Appeals by virtue of a writ of error to the Juvenile Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the
42 United States, do hereby command that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of December, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

43 (Endorsed:) File No. 28584. Supreme Court of the United States, No. 629, October term, 1921. The United States of America vs. Charles Walter Moreland. Writ of certiorari. Court of Appeals, District of Columbia. Filed Jan. 6, 1922. Henry W. Hodges, clerk.

In the Supreme Court of the United States.

October Term, 1921.

UNITED STATES, PETITIONER,
vs.
CHARLES WALTER MORELAND, RESPONDENT. } No. 629.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record

now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Court of Appeals of the District of Columbia to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
FOSTER WOOD,
Counsel for Respondent.

JANUARY 3, 1922.

(Endorsed:) No. 3662. Charles Walter Moreland, plaintiff in error, vs. United States. Stipulation of counsel as to return to writ of certiorari from Supreme Court, U. S. Court of Appeals, District of Columbia, filed Jan. 6, 1922. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 6th day of January, A. D. 1922.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at the city of Washington, District of Columbia, this 6th day of January, A. D. 1922.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsed:) File No. 28584. Supreme Court U. S., October Term, 1921. Term No. 629. The United States, petitioner, vs. Charles W. Moreland. Writ of certiorari and return. Filed Jan. 10, 1922.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 630.

UNITED STATES, Petitioner,

vs.

CHARLES WALTER MORELAND, Respondent.

BRIEF ON BEHALF OF PETITIONER.

JAMES M. BECK,
Solicitor General.

F. H. STEPHENS,
Corporation Counsel, D. C.

GEORGE P. BARSE,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 629.

UNITED STATES, PETITIONER,

vs.

CHARLES WALTER MORELAND, RESPONDENT.

BRIEF ON BEHALF OF PETITIONER.

Statement of the Case.

This case comes up on certiorari from the Court of Appeals of the District of Columbia, which reversed the judgment of the Juvenile Court of the District, where the respondent was charged under an information filed by the corporation counsel of the District of Columbia with failure to support his two minor children in necessitous circumstances. Respondent was tried by a petit jury on the twenty-first day of February, 1921, called in the Juvenile Court, and found guilty of failure to support his children since the first day

of February, 1920. On March 8, 1921, the imposition of sentence was suspended by the Juvenile Court on condition that plaintiff in error pay thirty dollars a month for one year, commencing March 20, 1921, to Katie M. Moreland, for support of minor children. Plaintiff in error applied for a writ of error to the Court of Appeals upon this judgment of the Juvenile Court, which petition was denied April 6, 1921. On April 15, 1921, the case was set for further hearing on April 18, 1921, before the honorable judge of the Juvenile Court. On April 18, 1921, the summons for the defendant was returned "not found"; whereupon bond, theretofore given, on March 8, 1921, was forfeited and the case continued to April 19, 1921.

On April 19, 1921, the plaintiff in error and his bondsman appeared; whereupon the order of April 18, 1921, forfeiting said bond, was set aside, and it appearing to the Juvenile Court that the order of March 8, 1921, regarding the payments of thirty dollars a month for the support of the two minor children had not been complied with, he was sentenced to be committed to the workhouse of the District of Columbia at hard labor for six months, the superintendent of the workhouse to pay to Katie M. Moreland for the support of the two minor children a sum equal to fifty cents for each day's hard labor by him performed; whereupon plaintiff in error applied for a writ of error to the Court of Appeals, which was granted on the fifteenth day of May, 1921.

In granting the writ that court directed the attention of counsel specifically to the claim that the provision of the Juvenile Court which provides for sentence at hard labor is unconstitutional.

The Court of Appeals Reversed the judgment of the Juvenile Court and directed the proceedings to be dismissed upon the ground that the imposition of a sentence to hard labor could not be imposed by the Juvenile Court because that was an infamous punishment under the Constitution and could not be inflicted unless preceded by the indictment of a grand jury. A motion was made by the United States to recall the mandate and amend it so as to send the cause back to the Juvenile Court for further proceedings not inconsistent with the opinion, instead of directing a dismissal of the cause, in order that the Juvenile Court might continue its jurisdiction under the statute by the imposition of a fine only. This motion was denied.

That thereafter petitioner made a further motion to recall the mandate and stay the same pending the application to this court for a certiorari to review the judgment of the Court of Appeals in the premises. This motion was granted by the Court of Appeals, the certiorari was allowed by this court, and a motion to advance the cause was made and granted.

The Court of Appeals based its judgment upon the decision of this court in the case of Wong Wing *vs.* United States, 163 U. S., 228, its opinion being in part as follows:

> "The single question necessary to be considered by us is whether the Juvenile Court has jurisdiction to impose a sentence involving hard labor where there has been no indictment or presentment by a grand jury, as provided by the Fifth Amendment to the Constitution.
>
> "In Wong Wing *vs.* United States, 163 U. S., 228, Wing had been sentenced to the house of correction at hard labor for a period of sixty days, and the court

> expressly held that imprisonment at hard labor constituted an infamous punishment, and that such imprisonment could be imposed only where there had been a compliance with the Constitution. We see no escape from the conclusion that the decision in that case is controlling in this, and we therefore reverse the judgment and remand the case with directions to dismiss the complaint.
>
> "Reversed and remanded."

Prosecutions in the Juvenile Court, which is a court of inferior jurisdiction, are begun on sworn informations filed by the corporation counsel. Section 12 of the Act of March 19, 1906, creating the Juvenile Court (34 Stats., 73) provides as follows:

> "SEC. 12. That prosecutions in the Juvenile Court shall be on information by the Corporation Counsel or his assistant. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury. In all cases where the accused would not under the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be fifty dollars or more, or imprisonment as punishment for the offense may be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury. In

all cases where said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year."

The jurisdiction of the Juvenile Court in cases of this character is derived from the Act of March 23, 1906 (34 Stats., 86). The first paragraph of that act provides:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person in the District of Columbia who shall, without just cause, desert or willfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances, or any person who shall, without just excuse, desert or willfully neglect or refuse to provide for the support and maintenance of his or her minor children under the age of sixteen years in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelve months, or by both such fine and imprisonment; and should a fine be imposed it may be directed by the court to be paid in whole or in part to the wife or to the guardian or custodian of the minor child or children: *Provided*, That before the trial, with the consent of the defendant, or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order, which shall be subject to change by it from time to time as circum-

> stances may require, directing the defendant to pay a certain sum weekly for the space of one year to the wife, or to the guardian or custodian of the minor child or children, or to an organization or individual approved by the court as trustee, and to release the defendant from custody on probation for the space of one year upon his or her entering into a recognizance, with or without sureties, in such sum as the court may direct. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court whenever ordered to do so within the year, and shall further comply with the terms of the order and of any subsequent modification thereof, then the recognizance shall be void, otherwise of full force and effect."

and by the third section it is provided:

> "SEC. 3. That it shall be the duty of the Superintendent in charge of the workhouse of the District of Columbia in which any person is confined on account of a sentence under this law to pay, out of any funds available, over to the wife, or to the guardian or custodian of his or her minor child or children, or to an organization or individual approved by the court as trustee, at the end of each week, for the support of such wife, child, or children, a sum equal to fifty cents for each day's hard labor performed by said person so confined."

Because of the ruling of the Court of Appeals in the case of United States *vs.* West, 34 App. D. C., 12, that the Juvenile Court did not have jurisdiction of cases of this character, section eight of the Act of June 18, 1912, "An act to provide for the support and maintenance of bastards in the

District of Columbia," 37 Stat., 134, conferred such jurisdiction upon the Juvenile Court as follows:

> "SEC. 8. That the juvenile court of the District of Columbia is hereby given jurisdiction in all cases arising under this act as well as concurrent jurisdiction with the Supreme Court of the District of Columbia in all cases arising under the act approved March twenty-third, nineteen hundred and six, entitled 'An act making it a misdemeanor in the District of Columbia to abandon or willfully neglect to provide for the support and maintenance by any person of his wife or of his or her minor children in destitute and necessitous circumstances.' And the court, in its discretion, may order payments to be made by delinquent fathers, at the precinct wherein they reside through the Metropolitan Police of the District of Columbia."

The Act of March 2, 1911, 36 Stats., 1003, making appropriations for the government of the District of Columbia, carries the following provisions:

> "WORKHOUSE.—For the following purposes in connection with removal of jail and workhouse prisoners from the District of Columbia to the site acquired for a workhouse in the State of Virginia, in accordance with the provisions of existing law, including superintendence, custody, clothing, guarding, maintenance, care and support of said prisoners; subsistence, furniture, and quarters for guards and other employees and inmates; the purchase and maintenance of farm implements, live stock, seeds, and miscellaneous items, tools and equipment; transportation and the means of transportation; the maintenance and operation of the means of transportation; and

supplies and personal services, and all other necessary items, one hundred and ninety-three thousand dollars, of which sum eighty thousand dollars shall be immediately available: *Provided,* That the Supreme Court of the District of Columbia, the Attorney General, and the Warden of the District of Columbia Jail, when so requested by the Commissioners of the District of Columbia, shall deliver into the custody of the superintendent or the authorized deputy or deputies of said superintendent of said workhouse, male and female prisoners sentenced to confinement in said jail for offenses against the common law or against statutes or ordinances relating to the District of Columbia, and, in the discretion of the Supreme Court of the District of Columbia and the Attorney General, male and female prisoners serving sentence in said jail for offenses against the United States, for the purposes named in the law authorizing the acquisition of the site for said workhouse and such other work or services as may be necessary, in the discretion of the Commissioners of said District, in connection with the construction, maintenance, and the operation of said workhouse, or the prosecution of any other public work at said institution or in the District of Columbia: *Provided further,* That, on the direction of said commissioners, male and female prisoners confined in any existing workhouse or in the Washington Asylum and Jail of the District of Columbia shall be delivered into the custody of said superintendent or the authorized deputy or deputies of said superintendent aforesaid, to perform similar work or services to those hereinbefore required of male and female prisoners serving sentences in the District of Columbia Jail: *Provided further,* that the Commissioners of the District of Columbia are hereby vested with jurisdiction over such male and female

prisoners from the time they are so delivered into the custody of said superintendent or the duly authorized deputy or deputies of said superintendent, including the time when such prisoners are in transit between the District of Columbia and the site acquired for such workhouse, and during the period such prisoners are on such site or in the District of Columbia until they are released or discharged under due process of law: *Provided further*, That all the authority, duties, discretion, and powers now vested in the Attorney General of the United States, by law, in relation to the support of prisoners sentenced to confinement in the jail of the District, including the custody of the jail building, grounds, and appurtenances, and authority over the warden and employees thereof, and in relation to and accounting for all appropriations in connection with such prisoners, jail, warden, and employees, are hereby transferred to and vested in the Commissioners of the District of Columbia, to take effect and be in force on and after the first day of July, nineteen hundred and eleven, and the Commissioners of the District of Columbia are hereby authorized and directed to receive and keep in the jail of the District of Columbia all other prisoners committed thereto for all offenses against the United States: *Provided further*, That the jail of the District of Columbia and the Washington Asylum of said District, on and after the first day of July, nineteen hundred and eleven, shall be combined as one institution, known as the Washington Asylum and Jail; and the Commissioners of said District are hereby authorized to appoint a superintendent of said institution, at a compensation of one thousand eight hundred dollars per annum, and the positions of warden of the jail and superintendent of the institution now known as Washington Asylum are abolished on and

after said date; and all the duties, discretion, and powers now vested in and exercised by the warden of the jail of said District and the superintendent of the present Washington Asylum are hereby transferred to and vested in the superintendent herein provided for, who shall give bond to the District of Columbia for the faithful performance of the duties of his office, as are now or may hereafter be prescribed, in the penal sum of five thousand dollars, with surety or sureties to be approved by said Commissioners: *Provided further*, That whenever and wherever authority of law exists to sentence, commit, order committed, or confine any person to or in said jail or asylum, said authority shall, on, from, and after July first, nineteen hundred and eleven, be exercised by sentence, commitment, order of commitment, or confinement to or in said Washington Asylum and Jail; *Provided further*, That all of the powers, duties, and authority now vested in the Supreme Court of the District of Columbia in relation to the appointment and removal of the warden of the jail of the District of Columbia, and in relation to the making of rules for the government and discipline of the prisoners confined in the jail, are hereby transferred to and vested in the Commissioners of the District of Columbia, who shall also have the authority heretofore vested in the warden to appoint subordinate officers, guards and employees, without the approval of the chief justice of the supreme court of the District of Columbia: *Provided further*, That the Commissioners of the District of Columbia are hereby authorized under such regulations as they may prescribe, to sell to the various departments and institutions of the government of the District of Columbia the products of said workhouse, and all moneys derived from such sales shall be paid into the Treasury, one-half to the credit of

R.S. D.C., 1086), providing that prisoners in the jail may be employed at such labor as may be prescribed by the Supreme Court of the District.

the United States and one-half to the credit of the District of Columbia."

Section 934 of the Code of Law for the District of Columbia should also be considered in this connection:

> "SEC. 934. *Place of Imprisonment.*—When any person shall be sentenced to imprisonment for a term not exceeding six months the court may direct that such imprisonment shall be either in the workhouse or in the jail. When any person is sentenced for a term longer than six months and not longer than one year such imprisonment shall be in the jail, and where the sentence is imprisonment for more than one year it shall be in the penitentiary. Cumulative sentences aggregating more than one year shall be deemed one sentence for the purposes of the foregoing provision. When the punishment of an offense may be imprisonment for more than one year the prosecution shall be in the supreme court of the District. When the maximum punishment is a fine only or imprisonment for one year or less the prosecution may be in the police court."

Assignment of Errors.

The petitioner assigns the following errors:

1. The court erred in holding that the sentence of six months at hard labor in the District workhouse imposed by the Juvenile Court was an infamous punishment, and that it could not be imposed without previous indictment or presentment by a grand jury.

2. The court erred in holding that the said judgment of the Juvenile Court should be reversed and the cause dis-

missed instead of remanding said cause for further proceedings not inconsistent with the decision that said sentence at hard labor was an infamous punishment which could not be imposed without previous indictment or presentment of a grand jury.

3. The court erred in not granting the motion of petitioner to recall and amend said mandate and to send said mandate back with directions for further proceedings not inconsistent with the decision that said sentence at hard labor was an infamous punishment which could not be imposed without previous indictment or presentation by a grand jury.

ARGUMENT.

The specific question in this case is whether imprisonment for six months at hard labor in the workhouse as a punishment for failure to support minor children in necessitous circumstances, under a statute creating the offense and specifically registering it as a misdeameanor and the proceeds of which labor, or part of them, are required by the statute to be devoted to the support of the children, is an infamous punishment under the Constitution and cannot be imposed in a proceeding begun by information, but must be preceded by the indictment of a grand jury.

I.

What is an Infamous Punishment?

Early Federal cases seemed inclined to follow a line of reasoning which held crimes, or punishments, infamous according to the results which flowed from conviction in the

way of the forfeiture of lands or goods, or disqualification as a witness or juror. This court, however, declined to follow these views and held distinctly in *Ex parte* Wilson, 114 U. S., 417, that it was the place of punishment, and said, quoting the opinion of Chief Justice Shaw in Jones *vs.* Robbins, 8 Gray, 329, 349, in effect, that imprisonment in the State prison is by law substituted for all ignominious punishments formerly in use and unless that were an infamous punishment none any longer existed other than capital. It was also said by this court in Mackin *vs.* United States, 117 U. S., 348, 354, that imprisonment in the penitentiary or State prison, with or without hard labor, was an infamous punishment.

Such has also been the law in the District of Columbia for many years. In the case of United States *vs.* Brady, 1 Mackey, 588, 594, the court, in discussing the statutes conferring jurisdiction upon the ~~Court of Appeals~~ Supreme Court of the District of Columbia, said:

> "As clearly as language can effect it, this law draws the line between non-infamous misdemeanors and other offenses at the wall of the penitentiary. It does not in terms declare all others which are amenable to penitentiary discipline to be infamous, but since there are but two classes of crimes with reference to this question, and every offense known must belong to one or the other, to determine the limits of one class expressly is to fix those of the other by necessary implication. If anything is to be gathered, then from this legislation that will determine the character of the offense now charged, the fact that it may be punished by imprisonment in a penitentiary would seem to place it in the category of infamous crimes."

It is a matter of interest, perhaps, that the argument in this case lasted six days and displayed, to use the language of the court, a "breadth of view, a depth of research, and a force of reasoning on both sides never before surpassed in this court." (See also *In re* Fry, 3 Mackey, 135, 138.)

These statutes were also the subject of discussion in the Mackin case, and this court arrived at a similar conclusion. This principle of the Wilson and Mackin cases was specifically reaffirmed in *In re* Mills, 135 U. S., 263, 267, 268, which was a case arising over the jurisdiction of the District Court for the Western District of Arkansas of offenses committed "at the Creek Nation, in the Indian country," of retailing liquor without paying special tax, and of selling and bringing liquor into the Indian country. There were two indictments for these offenses respectively: In the first the statutory punishment was a fine of not more than fifty dollars or not less than six months and not more than two years' imprisonment. Under the second, imprisonment for not more than two years and a fine of not more than three hundred dollars. Under the first indictment there was a sentence of one year in the Ohio State penitentiary, at Columbus, and a fine of one hundred dollars, with costs. Under the second, imprisonment in the same penitentiary for six months and a fine of fifty dollars, with costs. As the United States court for the Indian Territory had no jurisdiction of an offense punishable at hard labor, and as the statute under which the defendants in that case were prosecuted and sentenced might, in the discretion of the court, subject them to imprisonment in the penitentiary (where hard labor could be required as part of the routine and discipline of the institution), it was held that the United States

court for the Indian Territory could have no jurisdiction, this conclusion being strengthened, in the mind of this court, by the fact that the Indian territorial court had no grand jury and under the law could not have one, and therefore—

> "A different interpretation would impute to Congress a purpose to invest the court" * * * "with jurisdiction of offenses which it could not punish, for the want of authority to empanel a grand jury to return presentments or indictments against the offenders."

This language seems peculiarly applicable to the present case, because the Juvenile Court has no power to empanel a grand jury, and yet it is by specific provision of Congress in the eighth section of the Act of 1912 (*supra*) given jurisdiction of these non-support cases; and the fair inference would be that Congress did not intend "to invest the court * * * with jurisdiction of offenses which it could not punish for want of authority to empanel a grand jury," and that therefore it did not consider the offense of non-support (punishable, though it should be, by imprisonment at hard labor in a workhouse) to be an infamous punishment. The fact that the Supreme Court of the District of Columbia was also given concurrent jurisdiction, and that the Supreme Court does have a grand jury, does not affect this inference, inasmuch as an offense may be proceeded against either by indictment or information, where the statute so permits and the offense is not infamous.

Fitzpatrick *vs.* United States, 178 U. S., 304, was decided May 28, 1900, four years after the decision in Wong Wing (May 18, 1896). This was an indictment for murder in

the Territory of Alaska, a verdict of guilty "without capital punishment" and a sentence at hard labor for life in the penitentiary at San Quentin, California. The court reiterates here the doctrine set out in *Ex parte* Wilson, Mackin *vs.* United States, and *In re* Claasen that imprisonment in the penitentiary with or without hard labor is an infamous punishment. No reference is made to Wong Wing or to any possible modification of the doctrine by alleging that hard labor, also, wherever the place of confinement, was infamous. It is not possible that this court would have overlooked that modification, if one had been made, and not probable that it would have failed to mention it.

> "As was observed in *In re* Claasen, 140 U. S., 200, 205, with respect to infamous crimes under the Court of Appeals act prior to its amendment: 'A crime which is punishable by imprisonment in the State prison or penitentiary, as the crime of which the defendant was convicted, is an infamous crime whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one.' See also *Ex parte* Wilson, 114 U. S., 417, 426; Logan *vs.* U. S., 144 U. S., 263, 308; The *Paquete Habana*, 175 U. S., 677, 682; Motes *vs.* U. S., *post*."

No impression appears to have been made in the Federal courts, as shown by recent decisions, that there has been any modification of the doctrine announced in the Wilson and Mackin cases that imprisonment in the penitentiary or State prison is the test of an infamous punishment.

Blance *vs.* United States, 258 Fed. Rep., 921, 923:

"The offense, not being punishable by imprisonment for more than a year in the penitentiary, is not an infamous crime. Parkinson *vs.* United States, 121 U. S., 281; 7 Sup. Ct., 896; 30 L. Ed., 959; Mackin *vs.* United States, 117 U. S., 348; 6 Sup. Ct., 777; 29 L. Ed., 909; *In re* Claasen, 140 U. S., 204; 11 Sup. Ct., 735; 35 L. Ed., 409.

"We find no error and affirm the judgment."

Brown *vs.* United States, 260 Fed. Rep., 752, 753:

"But that a crime the punishment for which is confined to imprisonment in a county jail is but a misdemeanor, and may be prosecuted by information, has long been settled. United States *vs.* Waller, Fed. Cas. No. 16634, 1 Sawy., 701; United States *vs.* J. Lindsay Wells Co. (D. C.), 186 Fed., 248; *In re* Bonner, 151 U. S., 242; 14 Sup Ct., 323; 38 L. Ed., 149, and cases there cited; *Ex parte* Wilson, 114 U. S., 417, 425; 5 Sup. Ct., 935; 29 L. Ed., 89."

Rogers *vs.* Desportes, 268 Fed. Rep., 83, 89:

"In *Ex parte* Wilson, 114 U. S., 417; 5 Sup. Ct., 935; 29 L. Ed., 89, it was said that, in determining whether a crime was infamous within the meaning of the Constitution, the question is whether it 'is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one.' And in Mackin *vs.* United States, 117 U. S., 348; 6 Sup. Ct., 777; 29 L. Ed., 909, the court said:

"'We cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment.'

"So also:

"'A crime which might have been punished by imprisonment in a penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only.' The *Paquete Habana*, 175 U. S., 682; 20 Sup. Ct., 290; 44 L. Ed., 320."

Hunter *vs.* United States, 272 Fed. Rep., 235, 238:

"It is clear to our minds that the effect of the decisions of the courts generally is that a crime is not infamous unless it subjects one to the liability of punishment of death, or confinement in the State penitentiary, or to disqualification for holding office, or some other specific forfeiture, or disqualification not incident to ordinary misdemeanors. Since the adoption of the Criminal Code, which draws the dividing line between felonies and misdemeanors by designating as felonies all crimes which are punishable by imprisonment for more than a year, and as misdemeanors all other crimes, we conclude that all misdemeanors under the Federal law may be tried upon information, unless there should be coupled with the punishment of imprisonment some specific provision making the particular misdemeanor infamous. There is no such provision in the statute under consideration. The limit of punishment for the crime with which the defendant here is charged is imprisonment for not more than one year, or a fine of not more than $1,000, or both. Indictment by a grand jury, therefore, was unnecessary."

And the Court of Appeals itself, as late as 1915, in Chambers *vs.* Burroughs, 44 App. D. C., 168, 175, observed:

"Confinement in the penitentiary is the test of an infamous crime. Mackin *vs.* United States, 117 U. S., 348; 29 L. Ed., 909; 6 Sup. Ct. Rep., 777."

While the question of what constituted an infamous offense was not in issue in the case, nevertheless the court indicated its approval of the doctrine of the Mackin case, and thereby followed the rule, as before pointed out, which has been laid down by the courts of the District of Columbia ever since the Brady case.

Infamous offenses and felonies have frequently been classified in legal decisions as equivalent. This court, however, said in Bannon *vs.* United States, 156 U. S., 464, 467:

> "Neither does it necessarily follow that because the punishment affixed to an offense is infamous, the offense itself is thereby raised to the grade of felony. The word 'felony' was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded according to the degree of guilt. 4 Bl. Com., 94, 95; 1 Russell on Crimes, 42. Certainly there is no intimation to the contrary in *Mackin's case*, which was put wholly upon the ground that, at the present day, imprisonment in a State prison or penitentiary, with or without hard labor, is considered an infamous punishment. If such imprisonment were made the sole test of felonies, it would necessarily follow that a great many offenses of minor importance, such as selling distilled liquors without payment of the special tax, and other analogous offenses under the internal and customs revenue laws, would be treated as felonies, and the persons guilty of such offenses stigmatized as felons."

So the offense described in the statute involved in this case as a misdemeanor would be properly classified as an infamous misdemeanor, if the punishment be infamous.

The Wong Wing Case, 163 U. S., 228.

The decision of the court below rested upon the Wong Wing case. A discussion of that case and the extent to which it modified, if at all, the principles announced in the Wilson case and the Mackin case relating to infamous punishments is essential. The Wilson case, 114 U. S., 417, decided in 1885, was a sentence of fifteen years at hard labor, for counterfeiting, to the Detroit House of Correction, upon an information filed by the district attorney. The opinion disclosed a most careful consideration of the principles underlying the provision of the Fifth Amendment that "no person shall be held to answer for capital or otherwise infamous crime unless on the presentment or indictment of the grand jury." The court said, page 427:

> "Since the punishments of whipping and of standing in the pillory were abolished by the Act of February 28, 1839, ch. 36, sec. 5; 5 Stat., 322, imprisonment at hard labor has been substituted for nearly all other ignominious punishments, not capital. And by the Act of March 3, 1825, ch. 65, sec. 15, re-enacted in Rev. Stat., par. 5542, any sentence of imprisonment at hard labor may be ordered to be executed in a State prison or penitentiary, 4 Stat., 118.
>
> "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the First Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the district courts to cases 'where no other punishment than whipping, not ex-

ceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' * * * But at the present day either stocks or whipping might be thought an infamous punishment.

"For more than a century, imprisonment at hard labor in the State prison or penitentiary or other similar institution has been considered as infamous punishment in England and America." * * *

"The same view has been forcibly expressed by Chief Justice Shaw. Speaking of imprisonment in the State prison, which by the statutes of Massachusetts was required to be at hard labor, he said: 'Whether we consider the words "infamous punishment" in their popular meaning, or as they are understood by the Constitution and laws, a sentence to the State prison, for any term of time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole State, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline. *Some of these a convict in the house of correction is subject to; but the house of correction, under that and the various names of workhouse and bridewell, has not the same character of infamy attached to it. Besides, the State prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use; and, unless this is infamous, then there is now no infamous punishment other than capital*' (*Jones vs. Robbins*, 8 Gray, 329, 349)." (Italics ours.)

It will be observed, from this case, that in addition to laying down the doctrine that imprisonment at hard labor in

the penitentiary is an infamous offense, and that imprisonment in the penitentiary has been substituted for all ignominious punishments formerly in use, this court also draws attention (in the last part of the quotation) to the distinction, so far as infamy is concerned, between imprisonment in the penitentiary and in the workhouse. This distinction is exactly the point involved in the case at bar.

In Mackin *vs.* United States, 117 U. S., 348, the prosecution was begun by information filed by the District Attorney for conspiracy to commit and committing an offense against the United States, and a sentence of two years in the penitentiary of the State of Illinois at Joliet was imposed. This case was decided in March, 1886. After reviewing the Wilson case, the court said, page 352:

> "How far a convict sentenced by a court of the United States to imprisonment in a State prison or penitentiary, and not in terms sentenced to hard labor, can be put to work, either as part of his punishment, or as part of the discipline and treatment of the prison, was much discussed at the bar, but we have not found it necessary to dwell upon it, because we cannot doubt that at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress."

On page 354, the court says:

> "But the most conclusive evidence of the opinion of Congress upon this subject is to be found in the act conferring on the Police Court of the District of Columbia 'original and exclusive jurisdiction of all

> offenses against the United States, committed in the District, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary.' Act of June 17, 1870, ch. 133, sec. 1; 16 Stat., 153; Rev. Stat. D. C., 1049. 'Infamous crimes' are thus in the most explicit words defined to be those 'punishable by imprisonment in the penitentiary.' "

It thus appears that the doctrine of the Wilson case that imprisonment at hard labor in a State prison or penitentiary was an infamous punishment within the purview of the Fifth Amendment was modified in the Mackin case by the elimination of the requirement of hard labor, and thus imprisonment in the penitentiary was defined as of itself an infamous punishment. It is significant that the Juvenile Court Act, section 8, contains language of precisely the same import and almost identical terms with that conferring jurisdiction upon the Police Court. Section 8 says:

> "That the Juvenile Court of the District of Columbia shall have original and exclusive jurisdiction of all crimes and offenses of persons under seventeen years of age hereafter committed against the United States, not capital or otherwise infamous, and not punishable by imprisonment in the penitentiary, committed within the District of Columbia, except libel, conspiracy, and violations of the post-office and pension laws of the United States, and also of all offenses of persons under seventeen years of age hereafter committed against the laws, ordinances, and regulations of the District of Columbia, and shall have power to examine and commit or hold to bail all persons under seventeen years of age, either for trial or further

> examination, in all cases, whether cognizable therein or in the Supreme Court of the District of Columbia."
> * * *

Whatever force, therefore, this court gives this legislation of Congress as throwing light upon what constitutes an infamous punishment must pertain to the present case. The case of Wong Wing vs. United States, 163 U. S., 228, decided in 1896, which the Court of Appeals regarded as decisive of the instant case, was an arrest under a warrant issued upon the complaint of a deputy collector of customs upon a charge of being a Chinese person unlawfully within the United States, brought before a commissioner of the Circuit Court of the United States for the Eastern District of Michigan, tried by him, and sentenced to imprisonment at hard labor in the Detroit House of Correction for sixty days. The question in the case was thus stated by the court, page 235:

> "The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge or commissioner of the United States, without a trial by jury. In other words, we have to consider the meaning and validity of the fourth section of the Act of May 5, 1892, in the following words: 'That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be and remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided.' "

The court also said, page 235:

> "So, too, we think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offense, punishable by fine or imprisonment, if such offense were to be established by a judicial trial."

On page 237, the court said:

> "But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.
>
> * * * "But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial."

On page 238, the court said:

> "Our conclusion is that the commissioner, in sentencing the appellants to imprisonment at hard labor at and in the Detroit house of correction, acted without jurisdiction, and that the Circuit Court erred in not discharging the prisoners from such imprisonment, without prejudice to their detention according to law for deportation."

It was expressly decided in *In re* Miss., 135 U. S., 263, 270, and *In re* Bonner, 151 U. S., 242, 254, 255, that under sections 5541 and 5542 of the Revised Statutes of the United

States there could be no imprisonment in the penitentiary unless the sentence were for more than one year or at hard labor. When the sentence was for more than a year or at hard labor it might be in the penitentiary, and, therefore, within the doctrine of the Wilson and Mackin cases, it became an infamous punishment. As the statute under which Wong Wing was sentenced required imprisonment at hard labor, and as the Federal statute provided that any sentence of imprisonment at hard labor might be in the penitentiary, the punishment accorded Wong Wing (by committing him to the Detroit House of Correction, which was then and is now, a penitentiary), was, therefore, strictly within the doctrine of those cases, an infamous punishment. It will be observed that under the operation of the District of Columbia laws neither under the Act of March 23, 1906, conferring this jurisdiction upon the Juvenile Court, nor under the provisions of Section 934 of the Code, could there be imprisonment in the penitentiary. Under the former act the express provision is "or by imprisonment in the workhouse of the District of Columbia for not more than twelve months," and under the latter, "Where the sentence is imprisonment for more than one year it shall be in the penitentiary."

The reflection is respectfully tendered that if the Wong Wing case decided that imprisonment at hard labor is of itself an infamous punishment, it was an exceedingly inappropriate one for the announcement of that doctrine because the facts of that case disclose an entire absence of judicial process and the imposition of a sentence which was unquestionably under the previous rulings of this court and the statutes, an infamous punishment. If any such deduction is to be gleamed from the opinion in that case it is by process

of inferential reasoning, to which the minds of counsel refuse to accede; it certainly was not the decision.

If this punishment be infamous, as decided by the Court of Appeals, and if, under the principles laid down by this court in the Mills case, the Wilson case, and the Mackin case, what may be done under the statutes and not what is actually contained in the sentence be the test, it follows that the jurisdiction of the Police Court of the District of Columbia will be entirely destroyed and the workhouse, as a place of punishment, obliterated, because, under Section 48 of the Code of Law for the District of Columbia, failure to pay a fine may result in imprisonment, and under the Act of March 2, 1911, heretofore set forth, all commitments heretofore made to the workhouse and jail are now made to the Washington Asylum and Jail, and under the terms of that statute prisoners may be sent to Occoquan to work. As there is no provision in the statutes for the impaneling of a grand jury in the Police Court, it follows there could be no prosecution for minor criminal offenses and mere misdemeanors, such as the violation of a municipal ordinance, except upon the indictment of a grand jury. This seems to counsel to present a *reductio ad absurdum*.

This court decided in *Ex parte* Karstendick, 93 U. S., 396, that where a statute provides for imprisonment only the court may at its discretion direct execution in an institution where labor is exacted as a part of its discipline. This decision also is in conflict with the conclusion arrived at by the Court of Appeals.

It is impossible at the present day for any intelligent lawyer or layman to assert that hard labor is of itself ignominious or infamous. In the days of the common law in

England, when it was the custom of gentlemen to wear ruffles, powder their hair, and carry swords, it was undoubtedly considered ignominious for a gentleman to labor with his hands; and especially so in penal institutions where, as observed by Chief Justice Shaw, a convict was "subject to solitary imprisonment, to have his hair cut, and to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meager food, and a severe discipline." This court observed in *Ex parte* Wilson, 114 U. S., 427: "What punishment shall be considered as infamous may be affected by the changes of public opinion from one age to another."

Public opinion has undergone a very great change upon this subject. The usefulness and dignity of labor and the vicious results of idleness, particularly enforced idleness in penal institutes, have been the subject of so many themes, that public opinion may now be fairly said to have become fixed upon these subjects. The matter of prison reform in particular has been so often agitated and so frequently the subject of legislation that it is now trite to say that prisoners are no longer treated as savage beasts, with the idea of punishment uppermost, but are treated chiefly with a view to their reformation. As was said in State *ex rel.* Kelly *vs.* Wolfer, 138 N. W., 315; 119 Minn., 368; 42 L. R. A. (N. S.), 978:

> "No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the State, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of

his criminal tendencies, with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man and a rehabilitated citizen."

(From page 983, 42 L. R. A. (N. S.).)

II.

The provisions in the non-support act of March 23, 1906, for punishments of fine or imprisonment, are severable; therefore the decision of the Court of Appeals is erroneous in that, upon holding the provision for imprisonment at hard labor to be unconstitutional, it directed the dismissal of the case, instead of sending it back for further proceedings.

The Act of March 23, 1906, under which prosecution of defendant was had, provides, as to punishment, as follows:

> "and on conviction thereof shall be punished by a fine of not more than $500 *or* by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelve months *or* by both such fine and imprisonment."

It will be noted that these provisions are in the disjunctive, and that a fine alone may be imposed, entirely without reference to a sentence of imprisonment; in other words, Congress intended to, and did, provide more than one punishment, each separate and independent of the other, and did not, on the other hand, provide one indivisible punishment, the failure of any part of which would result in the failure of the whole. It is the well-settled principle that where one

provision of an act is unconstitutional the remaining portions may stand if they can be enforced without the necessity of adding any words to make them enforceable; that is, if the provisions are separate and independent of each other. The Court of Appeals itself recognizes this principle in District of Columbia *vs.* Green, 29 App. D. C., 296, 299, a case of criminal prosecution, wherein it says:

> "Without expressing any opinion as regards the validity of section 2, we may concede, for the purposes of this case, that it violates the principle of equality. But it does not follow that the entire act is for that reason to be declared void. The two sections are distinctly separable from and entirely independent of each other. The first may, therefore, stand and be enforced without regard to the validity of the second."

To the same effect is the recent case (Dec. 1918) of People *vs.* Sheffield Farms-Slawson-Decker Co., 121 N. E., 474, 477; 225 N. Y., 25, the syllabus of which states:

> "Assuming that Pen. Law No. 1275 is void in so far as it authorizes imprisonment of an employer for acts of an agent under Labor Law No. 162, that part that authorizes a moderate fine in such instances is valid, and may be severed from the bad."

Also see Lewis' Sutherland Statutory Construction (second edition), volume 1, page 583, and cases there cited.

This same doctrine has been uniformly held by this court. Penniman's case, 103 U. S., 714, 715, 716, 717, is closely analogous to the present one. There a stockholder of a corporation had been imprisoned because of failure to pay

his indebtedness as a stockholder. While he was in jail the General Assembly of Rhode Island passed an act containing the following provision:

> "SEC. 1. No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder."

Penniman applied for his discharge under this act and was opposed by the creditor on the ground that the section of the act in question was unconstitutional. This court, in passing upon the question, said:

> "It is only necessary to consider that part of section 1 of the act above recited which relieves a party from imprisonment upon the execution. Penniman invokes that provision and no other. He was merely relieved from imprisonment, and it is that and that only of which Tweedle complains. Statutes that are constitutional in part only will be upheld, so far as they are not in conflict with the Constitution, provided the allowed and the prohibited parts are severable. Packet Company *vs.* Keokuk, 95 U. S., 80. So that if so much of the section under consideration as relieves a debtor from imprisonment for debt is constitutional and can be severed from the other parts of the enactment, the judgment of the Supreme Court of Rhode Island should be affirmed.
>
> "That part of the section which relates to the imprisonment of the debtor, and that which relates to the seizure of his property, are entirely distinct and independent, and either one can stand and be operative, though the other should be declared void. We may, then, in deciding this case, consider section 1 as

> if it read: 'No person shall hereafter be imprisoned, or be continued in prison * * * upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.' "

In view of the foregoing, there can be no question as to the severableness of these provisions. The remaining question is as to whether or not Congress would have passed the act with the provision as to imprisonment left out. The rule has been stated by this court in the Employers' Liability cases, 207 U. S., 463, 501, as follows:

> "Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

The intent of Congress was to provide a method of criminal prosecution to require delinquent husbands and fathers to provide for the support of their wives and children and, in

case of failure, to punish them by a fine, which fine might be directed by the court to be paid in whole or in part to the wife or to the guardian or custodian of the minor child or children and, also in the discretion of the court, an additional punishment of imprisonment. It would therefore seem clear that if Congress could have foreseen that a provision for imprisonment at hard labor would be held unconstitutional, it would not, for that reason, have refrained from affording any relief whatsoever, but would undoubtedly have made some provision for punishment—that is to say, a fine. It also seems a fair inference that Congress would probably have gone further and provided for imprisonment without specifying hard labor, so that the statute might read exactly as at present so far as the punishment is concerned, except that the words "at hard labor" would have been left out.

The rule in this particular has been recently stated—July, 1918—in State *ex rel.* Audrain County *vs.* Hackman, 205 S. W. 12, as follows:

> "The test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the legislature would have enacted if it had known that the exscinded portions were invalid."

The Court of Appeals, even though it held the provision as to imprisonment at hard labor to be unconstitutional, should have remanded the case for further proceedings not inconsistent with such holding and left the statute enforceable without the supposed objectionable feature.

It is therefore respectfully submitted that the court erred in holding that imprisonment at hard labor is of itself an infamous punishment; also in holding the entire statute unconstitutional instead of eliminating what it considered the objectionable portion.

Respectfully submitted.

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Copy of above brief acknowledged this 9th day of February, 1922.

FOSTER WOOD,
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Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 629

UNITED STATES, Petitioner,

vs.

CHARLES WALKER MOREland, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

F. G. BRADSHAW,
GEORGE T. DAVIS,
LEWIS E. WEBSTER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No.

UNITED STATES, PETITIONER,

vs.

CHARLES WALTER MORELAND.

PETITION FOR WRIT OF CERTIORARI.

The petitioner states as follows:

1. That on January 18, 1921, an information was filed in the Juvenile Court of the District of Columbia against respondent, Charles Walter Moreland, charging him with the offense of non-support of his two minor children, under the Act of March 23, 1906 (34 Stats. at L., 86), entitled "An act making it a misdemeanor in the District of Columbia to abandon or wilfully neglect to provide for the support and maintenance by any person of his wife or of his or her minor children in destitute or necessitous circumstances;" the Act of June 18, 1912 (37 Stats. at L., 134, sec. 8), conferring

jurisdiction upon the Juvenile Court to try such cases, and the Act of March 19, 1906 (34 Stats. at L., 73, sec. 12), specifically providing "that prosecutions in the Juvenile Court shall be on information by the corporation counsel or his assistant;" that on February 21, 1921, respondent, represented by counsel, was tried before a jury of twelve on this charge and convicted.

2. That on April 19, 1921 (upon the termination of certain intermediate matters), respondent was sentenced to be committed to the workhouse of the District of Columbia at hard labor for six months, the superintendent of said workhouse to pay to Katie M. Moreland (as the mother and custodian of said children) for the support of the children a sum equal to fifty cents for each day's hard labor performed by respondent. Whereupon respondent applied to the Court of Appeals for writ of error, which was granted on May 16, 1921.

3. That in granting said writ of error the Court of Appeals directed the attention of counsel specifically to the claim of respondent that the provisions of law permitting the Juvenile Court to sentence to the workhouse at hard labor are unconstitutional. Argument of the case on appeal was centered upon that point. On November 7, 1921, the Court of Appeals reversed the judgment of the Juvenile Court, its opinion being in part as follows:

> "The single question necessary to be considered by us is whether the Juvenile Court has jurisdiction to impose a sentence involving hard labor where there has been no indictment or presentment by a grand jury, as provided by the Fifth Amendment to the Constitution,

> "In Wong Wing *vs.* United States, 163 U. S., 228, Wing had been sentenced to the house of correction at hard labor for a period of sixty days, and the court expressly held that imprisonment at hard labor constituted an infamous punishment, and that such imprisonment could be imposed only where there had been a compliance with the Constitution. We see no escape from the conclusion that the decision in that case is controlling in this, and we therefore reverse the judgment and remand the case with directions to dismiss the complaint.
>
> "*Reversed* and *remanded.*"

Mandate in accordance therewith was directed to the Juvenile Court the same day.

4. That on November 8, 1921, petitioner, in writing, moved the court to recall said mandate and to amend same so as to send cause back to the Juvenile Court for such further proceedings as might be proper and not inconsistent with the opinion and decision of the Court of Appeals, assigning as reason therefore that the said Non-support Act of March 3, 1906, provided three severable punishments, to wit:

> "and on conviction thereof shall be punished by a fine of not more than $500 *or* by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelves months *or* by both such fine and imprisonment,"

and that from the fact that it had been decided that the Juvenile Court did not have the power to impose the punishment of imprisonment at hard labor it did not necessarily follow that it could not impose the other punishment of a fine or perhaps even impose imprisonment without hard

labor, and that therefore the judgment directing the dismissal of the cause was broader than the issue involved required. On November 10, 1921, this motion was denied.

5. On November 14, 1921, respondent and his counsel appeared before the Juvenile Court and requested that he be discharged as directed by said mandate, but the court was not willing to discharge him because of expected application to this court for writ of certiorari, and no further action was taken. On November 17, 1921, the Court of Appeals, on motion of petitioner herein (respondent still not having been discharged by the Juvenile Court), recalled the said mandate and granted a stay thereof pending the application of petitioner to this honorable court for a writ of certiorari to review the proceedings herein.

6. Petitioner files herewith, as an exhibit, a certified copy of the entire transcript of record of the case, including the proceedings in the Court of Appeals.

7. That in basing its decision upon the Wong Wing case the appellate court entirely misinterpreted the application of that case to the case at bar and entirely overlooked or ignored two important factors present in that case which are not present in the instant case and which become apparent in the Wong Wing case only by a reading of the cases of *Ex parte* Wilson, 114 U. S., 417, and Mackin *vs.* United States, 117 U. S., 348, upon which cases the Wong Wing case is based, these factors being that under the law Wong Wing was subject to imprisonment in a State penitentiary, and further that he actually was imprisoned in the Detroit house of correction, a State penitentiary. Consequently, the indication by this honorable court in the Wong

Wing case that imprisonment in a State penitentiary at hard labor is an infamous offense and must be preceded by indictment or presentment by a grand jury did not justify the appellate court in the present case in holding that a sentence by the Juvenile Court to imprisonment at hard labor, not in a State penitentiary, but in the city workhouse (the labor of the defendant to be paid for at the rate of fifty cents per day and to be paid to the family of the defendant for their support), was likewise an infamous offense. As will be pointed out in the short memorandum brief attached, the Mackin case specifically draws the line between infamous and non-infamous punishments at the wall of the penitentiary.

8. That, as indicated in paragraph four hereof, petitioner believes the punishments provided in the Non-support Act are severable, and that therefore the judgment of the appellate court was too broad and should not have directed the dismissal of the cause, but should merely have remanded it for further proceedings in accordance with law.

9. For the foregoing reasons and for others which will appear if this petition is granted, petitioner assigns the following errors committed by the Court of Appeals:

(*a*) The court erred in holding that the sentence of six months at hard labor in the District workhouse imposed by the Juvenile Court was an infamous punishment, and that it could not be imposed without previous indictment or presentment by a grand jury.

(*b*) The court erred in holding that the said judgment of the Juvenile Court should be reversed and the cause dismissed instead of remanding said cause for further proceedings not inconsistent with the de-

cision that said sentence at hard labor was an infamous punishment which could not be imposed without previous indictment or presentment of a grand jury.

(*c*) The court erred in not granting the motion of petitioner to recall and amend said mandate and to send said mandate back with directions for further proceedings not inconsistent with the decision that said sentence at hard labor was an infamous punishment which could not be imposed without previous indictment or presentment by a grand jury.

10. The decision of the Court of Appeals herein complained of, if permitted to stand, will result in the total destruction of the power of the Juvenile Court to render that speedy and humane relief to destitute and dependent wives and children which it has been rendering for the past fifteen years, and will cause such dependents to wait on the more involved civil proceedings of the equity court or the proceedings by indictment in the criminal court and to have to resort to charity for sustenance in the meantime. Furthermore, the decision is of more than local importance, as it will undoubtedly be seized upon in all other jurisdictions having similar laws, both as to non-support and as to the punishment of other misdemeanors by imprisonment at hard labor in the city jail or workhouse. Therefore it is believed that the matter is of sufficient general, as well as local, importance to justify a certiorari in the case to this court, in order that the principles involved may be thoroughly considered *pro* and *con* and the proper rule established.

To the end, therefore, that the action of the said Court of Appeals as aforesaid may be reviewed and determined by

this court, petitioner prays that the said Court of Appeals be required by certiorari to certify the said cause to this court, according to the form of the statute in such case made and provided, and that in that behalf all necessary orders may be made and proceedings had.

Respectfully submitted,

UNITED STATES,
Petitioner,

By F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,
Defendant's Attorneys.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No.

UNITED STATES, PETITIONER,

vs.

CHARLES WALTER MORELAND.

BRIEF IN SUPPORT OF PETITION.

I.

THE SENTENCE IMPOSED BY THE JUVENILE COURT WAS NOT AN INFAMOUS PUNISHMENT.

The Court of Appeals in its opinion expressly bases its decision upon the case of Wong Wing *vs.* United States, 163 U. S., 228, and states as its reason that the Supreme Court of the United States in that case "expressly held that imprisonment at hard labor constituted an infamous punishment." It is respectfully submitted that this court did not so hold This court did indicate that imprisonment at hard labor *in a State penitentiary* was an infamous punishment, and in so doing expressly followed the previous cases of *Ex parte* Wilson, 114 U. S., 428, and Mackin *vs.* United

States, 117 U. S., pages 348, 352. This is entirely different from holding that imprisonment at hard labor, *not* in a State penitentiary, but in a city jail or workhouse, is an infamous punishment, which was the effect of the decision of the Court of Appeals in the present case.

In the Wong Wing case, Wing was arrested upon a warrant charging him with being unlawfully within the United States, was taken before the United States circuit court commissioner, and upon examination before him he adjudged that Wing was unlawfully within the United States, and that he should be imprisoned at hard labor in the Detroit house of correction for a period of sixty days, at the expiration of which time he should be removed from the United States to China. This was the imposition of a punishment without any semblance of a judicial trial; also it was the imposition of an infamous punishment, inasmuch as it was at hard labor in a State penitentiary. The issue in the case is stated on page 235 of the opinion as follows:

> "The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge or commissioner of the United States, without a trial by jury. In other words, we have to consider the meaning and validity of the fourth section of the act of May 5, 1892, in the following words: 'That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be and remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

On page 237 the court said:

> "But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."

The decision of the court (on page 238) is as follows:

> "Our conclusion is that the commissioner, in sentencing the appellants to imprisonment at hard labor at and in the Detroit house of correction, acted without jurisdiction, and that the circuit court erred in not discharging the prisoners from such imprisonment, without prejudice to their detention according to law for deportation."

Bearing in mind that the issue in a case limits the scope of its application as a precedent for other cases, it will be seen that this court in effect stated that no punishment, whether infamous or not, could be inflicted without a judicial trial; and it developed, also, that if the particular punishment happened to be an infamous one that judicial trial would require previous indictment or presentment by a grand jury.

As stated in the petition filed herewith, the appellate court entirely misinterpreted the application of the Wong Wing case to the case at bar, and this apparently was from a failure to bear in mind the two facts that the imprisonment of Wing was in a State penitentiary, and that under the statutes then existing his imprisonment at hard labor could be compelled to be in a State penitentiary. A reference to *Ex parte* Wilson, *supra,* shows (on page 418), that the

Detroit house of correction was a penitentiary, and that Wilson had been sentenced to be imprisoned there for fifteen years at hard labor. (*De hors* the record, it may be stated that inquiry today at the Department of Justice reveals that the Federal Government is still committing its penitentiary prisoners to the Detroit house of correction.) In the Mackin case, *supra,* it was held that by *express* provision of Congress a sentence to "imprisonment and confinement at hard labor" might be ordered to be in a State prison or penitentiary. A sentence under a particular law at hard labor, in which the law specifically directed the imprisonment at hard labor in a city jail or workhouse, would preclude sentence to a State penitentiary and would indicate that the Legislature viewed the particular offense as being of a lower grade than an infamous punishment. In the present case, the Non-support Act specifically makes the offense a misdemeanor and directs the imprisonment at hard labor to be in the city workhouse. In the Wong Wing case, section 4 of the Act of 1892 simply provides that the imprisonment may be at hard labor, with no designtion of the place of imprisonment; consequently in the Wong Wing case the imprisonment might be in a State prison or penitentiary, and therefore was infamous. If these facts are constantly borne in mind in considering both the majority decision and the opinion of Mr. Justice Field, no difficulty can be had as to the meaning conveyed by the court in the Wong Wing case.

Any question as to what constituted an infamous punishment is clearly settled by this court in the Mackin case, *supra,* where the defendant was tried on an information and was sentenced to two years imprisonment and was sent

to the Joliet penitentiary. The statute did not provide that the imprisonment should be at hard labor. Defendant questioned his right to be tried without indictment or presentment by a grand jury, on the ground that the statute provided an infamous punishment. On page 352 of the opinion, the court said: "We cannot doubt that at the present day imprisonment in a State prison or penitentiary, *with or without hard labor,* is an infamous punishment." (Italics ours.) This undoubtedly indicates that the matter of hard labor is immaterial in determining whether or not the punishment is infamous, and that it is the imprisonment in the penitentiary which is the test. On page 354 the court said:

> "The including, in a single clause, of two classes of offenses, one of which may be prosecuted by information, is a sufficient reason for mentioning informations as well as indictments, without attributing to Congress an intention that both classes should be prosecuted by information; *and imprisonment in the penitentiary is made the line of distinction between the two classes.*
>
> "But the most conclusive evidence of the opinion of Congress upon this subject is to be found in the act conferring on the Police Court of the District of Columbia 'original and exclusive jurisdiction of all offenses against the United States, committed in the District, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors *not punishable by imprisonment in the penitentiary.*' Act of June 17, 1870, ch. 133, par. 1; 16 Stat., 153; Rev. Stat. D. C., par. 1049. *'Infamous crimes' are thus in the most explicit words defined to be those 'punishable by imprisonment in the penitentiary.'*" (Italics ours.)

Here the court explicitly states, as to infamous and non-infamous punishments, that imprisonment at the penitentiary is made the line of distinction between the two classes.

It may be noted, in passing, that the Court of Appeals itself, in Chambers *vs.* Buroughs, 44 Appeals D. C., 168, 175, adopts this same test, saying "Confinement in the penitentiary is *the* test of an infamous crime," and cites the Mackin case as its authority for so holding.

It may also be noted that the imprisonment at hard labor authorized by the Non-support Act, and imposed in the present case, was to be paid for at the rate of fifty cents per day, the money to go to the support of respondent's children; in other words, if a man will not work to support his family, the State will compel him to work, and turn over to his family the proceeds from his labor, and thereby compel him to perform his duty to them and to the State. This is far different from the kind of "imprisonment at hard labor, compulsory and unpaid," mentioned in *Ex Parte* Wilson, *supra,* on page 429 thereof, as constituting involuntary servitude for crime.

II.

THE PUNISHMENTS PROVIDED IN THE NON-SUPPORT ACT OF MARCH 23, 1906, ARE SEVERABLE, AND THEREFORE THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS IN THAT IT DISMISSED THE CASE INSTEAD OF SENDING IT BACK FOR FURTHER PROCEEDINGS.

As stated in the petition filed herewith, the provisions for punishment of the offense of non-support, as contained in

the Act of March 23, 1906, under which prosecution of respondent was had, are as follows:

> "and on conviction thereof shall be punished by a fine of not more than $500 *or* by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelve months *or* by both such fine and imprisonment."

It will be noted that these provisions are in the disjunctive, and that a fine may be imposed alone and entirely without reference to the imposition of imprisonment; in other words, Congress intended to and did provide more than one punishment, each separate and independent of the other, and did not, on the other hand, provide one indivisible punishment, the failure of any part of which will result in the failure of the whole. It is the well-settled principle that where one provision of an act is unconstitutional the remaining portions of the act may stand if they can be enforced as they stand without the necessity of adding any words to make them enforceable; in other words, if the provisions are separate and independent of each other. The Court of Appeals itself recognizes this principle in District of Columbia *vs.* Greene, 29 Appeals D. C., 296, 299, a case of criminal prosecution, wherein it says:

> "Without expressing any opinion as regards the validity of section 2, we may concede, for the purposes of this case, that it violates the principle of equality. But it does not follow that the entire act is for that reason to be declared void. The two sections are distinctly separable from and entirely independent of each other. The first may, therefore, stand and be enforced without regard to the validity of the second."

Again, in Hyde *vs.* Southern Railway Company, 31 Appeals D. C., 466, 470, in quoting from Employers' Liability cases (270 U. S., 463), the Court of Appeals said, on page 470 of its opinion:

> "Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not effect may be given to the legal provisions by separating them from the illegal."

Again, on page 471 of the opinion, the court said:

> "This condition of severableness of the provisions of a statute, that may preserve the validity of one notwithstanding the repugnance of the other to the Constitution, is not dependent upon the fact that they may be found in separate sections, though this would ordinarily render the task of separation easier. It is sufficient if the separation can be accomplished by excising a clause of the same section and leaving the remainder complete and unchanged in meaning without reading into it another word."

On page 472:

> "As thus read, the section is perfect and complete without the addition of a new word, or the slightest change in the meaning of one that has been used."

In Penniman's case, 103 U. S., 714, in construing a section of the statute providing "No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder," this court said (on page 717):

> "That part of the section which relates to the imprisonment of the debtor, and that which relates to the seizure of his property, are entirely distinct and independent, and either one can stand and be operative, though the other should be declared void. We may, then, in deciding this case, consider section 1 as if it read: 'No person shall hereafter be imprisoned, or be continued in prison, * * * upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder.' "

It would therefore seem clear that the fact that the Court of Appeals has held that the provision of the Non-support Act as to imprisonment at hard labor is unconstitutional, in so far as the Juvenile Court is concerned, does not prevent an enforcement of the other provision of the statute for the imposition of a fine, inasmuch as each is independent of the other; and it would seem clear that if Congress could have foreseen that the provision for imprisonment at hard labor would have been held unconstitutional that it would have enacted the statute in its present form, leaving out the words "at hard labor," as that would have given an entirely workable statute.

Respectfully submitted,

F. H. STEPHENS,
GEORGE P. BARSE,
LEWIS B. PERKINS,
Attorneys for Petitioner.

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IN THE

Supreme Court of The United States

October Term, 1921

No. 629

UNITED STATES, *Petitioner,*

vs.

CHARLES WALTER MORELAND, *Respondent*

BRIEF ON BEHALF OF RESPONDENT

STATEMENT OF THE CASE

By the act of March 23, 1906, (34 Stats. 86) Congress provided the punishment for the crime of which the defendant was convicted to be a fine of not more than five hundred dollars ($500.), or imprisonment in the work house of the District of Columbia at hard labor for not more than twelve (12) months, or by both such fine and imprisonment.

The sentence of the court was that the defendant serve six months in the work house of the District of Columbia at hard labor. (R. p. 20.)

ARGUMENT

Is Imprisonment at Hard Labor Infamous Punishment?

It is conceded that an infamous crime is not punishable except upon indictment by a grand jury and that whether or not a crime be infamous depends upon the punishment which may be inflicted, the issue therefore being, is imprisonment at hard labor, a punishment which is infamous.

Sir William Blackstone, (4 Com. 377), classes hard labor as one of the punishments which consists principally in its ignominy.

Black's Law Dictionary defines hard labor as a punishment additional to mere imprisonment, sometimes imposed upon convicts sentenced to a penitentiary.

Mr. Dane, one of the most learned in law of his time, and a member of the Continental Congress in 3 Dane Abr. 459 says:

> "Punishments clearly infamous are death, gallows, pillory, branding, whipping, confinement at hard labor and cropping."

In Ex parte Wilson (114 U. S. 429) this court said:

> "Since the punishment of whipping and standing in the pillory were abolished by the act of February 28, 1839, Chap. 36, Sec. 5, Stat. at L. 322, imprisonment at hard labor has been substituted for nearly all other ignominious punishments not capital."
>
> "Imprisonment at hard labor compulsory and unpaid is in the strongest sense of the words 'involuntary servitude for crime.' "

U. S. vs. Todd (25 Fed. 815) the court said:

> "Prisoners in the Ohio penitentaries are by law kept at hard labor.
>
> "A sentence by the court to imprisonment in an Ohio penitentiary is therefore in effect a sentence to imprisonment at hard labor. As the crime charged would * * * subject the accused to a term at hard labor, it is infamous."

In Ludlem vs. McCuen (17 N. J. 12) the court held that mutilation, whipping, branding, pillory, and hard labor in the house of correction are infamous punishments.

In U. S. vs. Wong Dep Ken (57 Fed. Rep. 206), Wong Dep Ken was found to be unlawfully in the United States and sentenced to two days' imprisonment at hard labor, and at the expiration of the sentence to be deported. The court held that the fourth section of the act of May 5, 1892, known as the Geary Act, providing for imprisonment at hard labor for a period not exceeding one year, renders the crime for which it is inflicted infamous, and is therefore void, because the act does not provide for a judicial trial to establish the fact of guilt.

In Garles vs. U. S. (87 Fed. Rep. 183) the court said:

> "We think, however, that there is a substantial difference between having to submit to hard labor as a part of the discipline and treatment in the state penitentiary to which, by statute, the courts are authorized to sentence convicted offenders, and the having pronounced against them a sentence to hard labor as a brand or mark of the grade of their punishment for the offense. * * * We think that the embodying in the sentence of the words 'at hard labor' gives the stigma an emphasis which the statute does not authorize."

In U. S. vs. Nelson (254 Fed. Rep. 889, 891), the defendant was convicted of a violation of the draft act and sentenced to imprisonment in the city jail, in the city of New York. While there imprisoned he was forced to do hard labor, and he brought a writ of habeas corpus to secure his release on the grounds that being subjected to hard labor in the city jail constituted an infamous punishment, and that he had not been prosecuted upon an indictment of the grand jury. The court said:

> "In view of the foregoing, I am of the opinion that the provisions of Sections 700 and 702 of the charter of the city of New York are not intended to authorize the employment of federal prisoners at hard labor un-

less the sentence so directs. Federal prisoners must, of course, be subject to the discipline of local jails, but they cannot be there committed at hard labor under a sentence imposed as a result of having committed the crime of which the defendant herein has been convicted. Any other construction of the Charter would necessarily mean that no crime against the United States involving imprisonment in a penal institution of the city of New York may be prosecuted except by indictment."

In U. S. vs. Smith (40 Fed. Rep. 755), the court said:

"At the present day imprisonment with or without hard labor to a penitentiary where by the rules of the prison or the laws of the state, hard labor is exacted of the prisoners, is an infamous punishment, and a crime which may be so punished is an infamous crime."

The constitution of the state of Louisiana contains a provision that all offenses are bailable except those punishable by death, or imprisonment at hard labor.

In Jamison vs. Wimbish, (130 Fed. Rep. 351), the court said:

"Laws G. 1893, p. 259, providing that the recorder of the city of Macon shall have power to impose fines for violation of the ordinances of such city to an amount not exceeding five hundred dollars ($500.), to imprison offenders in the city barracks for not more than sixty (60) days, or a sentence to labor on the public works in the county chain gang for not more than six (6) months, provides for a sentence to infamous punishment in the chain gang by such recorder for a petty municipal offense, and creates by the sentence to the chain gang, an infamous punishment.

"An order of the police magistrate directing that a person shall serve a term in a chain gang is a sentence to infamous punishment."

THE WONG WING CASE

This court in Wong Wing vs. U. S. (163 U. S. 230, 41 L. Ed. 140, Dec. 1896) discharging the defendant on a writ of Habeas Corpus said:

> "It is claimed that the fourth section of the Act of 1892, which provides that any such Chinese person, or persons of Chinese descent, convicted and adjudged to be not lawfully entitled to be, or to remain in the United States, should be imprisoned at hard labor for a period not exceeding one year, inflicts an infamous punishment.
>
> "The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion, punishment by imprisonment at hard labor * * * without a trial by jury.
>
> "We think it clear that detention and temporary confinement * * * would be valid. * * *
>
> "But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation unless provision were made that the fact of guilt were first established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime find the fact of guilt and adjudge the punishment by one of its own agents.
>
> "Applying this reasoning to the fifth and sixth Amendments it must be concluded that * * * even aliens should not be held to answer for a capital or other infamous crime unless on a presentment or indictment by a grand jury."

Mr. Justice Field, concurring in part and dissenting in part, said:

> "The question involved is, whether a Chinese person can be lawfully convicted and sentenced to imprisonment at hard labor for a definite period by a commissioner without indictment or trial by jury. The question involves the constitutionality of Section 4 of the act of 1892. It is submitted that this section is invalid because it conflicts with the fifth Amendment of the Constitution * * * and also conflicts with the sixth Amendment of the Constitution. * * *
>
> "Whenever the law provides that imprisonment shall follow a trial and conviction of the offender, it necessarily intends that such imprisonment shall be inflicted as punishment, for the offense of which the person has been convicted. Imprisonment at hard labor for a definite period is not only punishment but it is punishment of an infamous character."

In the foregoing case this court squarely held that imprisonment at hard labor was infamous. Nowhere are the words "state prison" or "penitentiary" used and this case and the Wong Dep Ken case are identical with the present case, for in these cases as in this case the imprisonment may be at hard labor for a period not exceeding one year.

The phrase cited by petitioner as being quoted from Blanche vs. U. S. (25 Fed. Rep. 921), is mere dicta, for in that case the defendant, Blanche, was not sentenced to imprisonment at hard labor nor did the statute under which he was sentenced authorize hard labor as part of the punishment.

Counsel for petitioner further cited from the case of Brown vs. U. S. (260 Fed. Rep. 752), in which case hard labor was not a part of the sentence or punishment or authorized by statute.

The next case which petitioner cites is Rogers vs. Despotes (268 Fed. 83) counsel for respondent agrees with the decision in that case, but does not consider it pertinent to the issue in this case.

Counsel cites the decision in the case of Hunter vs. U. S. (272 Fed. Rep. 235), in which decision the court said:

> "We conclude that all misdemeanors under the federal law may be tried upon information, unless there should be coupled with the punishment of imprisonment some specific provision making the particular misdemeanor infamous."

In this case the sentence did not have attached to it hard labor nor was hard labor authorized by statute. In the present case there is the specific provision "at hard labor" coupled with the punishment of imprisonment.

The next case quoted by counsel for petitioner is Chambers vs. Burroughs (44 D. C. Appeals 168). This was a suit in equity and decided by the same court that decided the present case, and so much of the decision relative to infamous crimes is at most dicta.

Where is the case holding imprisonment at hard labor non-infamous?

In Mitchel vs. U. S. (196 Fed. 874) and Haynes vs. U. S. (101 Fed. 817), the court held punishment at hard labor to be illegal unless authorized by statute.

In the case of U. S. vs. Nelson (254 Fed. Rep. 889), the court held that a prisoner in a local jail in the city of New York, who was subjected to hard labor would be undergoing an infamous punishment.

Congress recognizes the fact that a sentence to hard labor is imposing an additional punishment besides imprisonment and in U. S. Compiled Statutes, 1918, Section 10528, states that any one convicted of any offense against the United States who is sentenced to imprisonment at hard labor, his sentence may be executed in any state jail or penitentiary.

Counsel for petitioner contends that Congress, giving the Juvenile Court jurisdiction, thereby did not consider the offense infamous. It is submitted that Congress has no power to say what offense shall or shall not be infamous, and if Congress creates an offense, and attaches thereto a punishment which is infamous, the fifth Amendment to the Constitution protects citizens from prosecution except upon an indictment by a grand jury, and Congress cannot deprive citizens of that protection by law, inference, or otherwise. All penal acts of Congress must be construed by the courts in subordination to the provisions of the Constitution of the United States.

Petitioner contends that the court errored in holding the act unconstitutional. I did not so understand the judgment of the court. The Court of Appeals of the District of Columbia held that the Juvenile Court had no jurisdiction, and that imprisonment at hard labor constituted an infamous punsihment, and could only be imposed where there had been a compliance with the Constitution.

Petitioner contends that even though part of the act may be unconstitutional and void the court should have remanded the case for further proceedings consistent with this decision. The act provides for a fine or imprisonment in the work house of the District of Columbia at hard labor. How could the court enforce payment of fine if it cannot imprison. If their contention were correct every crime

could be proceeded against by information, and the court refrain from imposing an infamous punishment.

In the Wong Wing case this court ordered the petitioner, Wong Wing, released and held that the sentence of the commissoiners void, and did not remand the case for further proceedings holding the commissioners could deport the defendant although without power to imprison at hard labor.

In the case of Jamison vs. Winbish (130 Fed. Rep. 351) the court ordered the petitioner released. In that case the city ordinance provided that the recorder of the city of Macon should have power to impose a fine of not more than five hundred dollars ($500.), to imprison offender in city barracks for not more than sixty (60) days, or to sentence to labor on city works in county chain gang, the court holding the offense because of the provisions authorizing a sentence to labor in the county chain gang infamous.

It is respectfully submitted that imprisonment at hard labor is an infamous punishment and that the Juveline Court had no jurisdiction to try the defendant.

Respectfully submitted,

FOSTER WOOD,
Attorney for Respondent.

UNITED STATES *v.* MORELAND.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 629. Argued March 9, 10, 1922.—Decided April 17, 1922.

1. Imprisonment at hard labor, whether in a penitentiary or elsewhere, is an infamous punishment within the meaning of the Fifth Amendment, and prosecution for a crime so punishable must be by indictment or presentment by a grand jury. P. 435. *Wong Wing* v. *United States*, 163 U. S. 228, and *Ex parte Wilson*, 114 U. S. 417, followed; *Fitzpatrick* v. *United States*, 178 U. S. 304, distinguished.
2. Hence, a prosecution in the Juvenile Court of the District of Columbia for the crime of wilfully neglecting or refusing to provide for the support and maintenance of minor children, defined by the Act of March 23, 1906, and thereby made punishable by a fine or by imprisonment at hard labor in the workhouse of the District, or by both, can not be by information. P. 438.
3. It is the punishment which may be, and not that which actually is, imposed under the statute, that determines the right to prosecute otherwise than through a grand jury. P. 441.
4. Where an act defining a misdemeanor provides for punishment by fine or imprisonment at hard labor, the provision as to hard labor can not be treated as severable to sustain a prosecution by information. P. 441.

276 Fed. 640, affirmed.

CERTIORARI to review a judgment of the Court of Appeals of the District of Columbia, which reversed a judgment of the Juvenile Court of the District sentencing the respondent to six months' imprisonment in the workhouse for the misdemeanor of wilfully neglecting to support his minor children, in violation of the Act of March 23, 1906, c. 1131, 34 Stat. 86. The sentence was based on the verdict of a jury finding respondent guilty of this offense. The judgment under review directed that the complaint in the Juvenile Court be dismissed. The Act of March 19, 1906, c. 960, § 12, 34, Stat. 73, creating the Juvenile Court, provided that prosecutions therein should be on informa-

tion of the corporation counsel or his assistant. The Act of June 18, 1912, c. 171, § 8, 37 Stat. 134, conferred upon that court concurrent jurisdiction with the Supreme Court of the District in all cases arising under the Act of March 23, 1906, *supra*.

Mr. George P. Barse and *Mr. F. H. Stephens*, with whom *Mr. Solicitor General Beck* and *Mr. Lewis B. Perkins* were on the brief, for the United States.

Mr. Foster Wood for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is what procedure, in the prosecution and conviction for crime, the Fifth Amendment of the Constitution of the United States makes dependent upon the character of punishment assigned to the crime.

The Amendment provides that " no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . ."

The respondent Moreland was proceeded against in the Juvenile Court of the District of Columbia by information, not by presentment or indictment by a grand jury, for the crime of wilfully neglecting or refusing to provide for the support and maintenance of his minor children. The statute prescribes the punishment to be " a fine of not more than five hundred dollars or by imprisonment in the workhouse of the District of Columbia at hard labor for not more than twelve months, or by both such fine and imprisonment." Act of March 23, 1906, c. 1131, 34 Stat. 86.

He was tried by a jury and found guilty and, after certain proceedings with which we have no concern, he

was sentenced to the workhouse at hard labor for six months.

The Court of Appeals reversed the judgment and remanded the case to the Juvenile Court with directions to dismiss the complaint. The court considered that it was constrained to decide that the judgment was in violation of the Fifth Amendment, and, therefore, to reverse it on the authority of *Wong Wing* v. *United States,* 163 U. S. 228.

The United States resists both the authority and extent of that case by the citation of others, which, it asserts, modify or overrule it. A review of it, therefore, is of initial importance.

Certain statutes of the United States made it unlawful under certain circumstances for a Chinese laborer to be in the United States, and provided for his deportation by certain officers, among others a Commissioner of a United States court. And one of them (Act of 1892) provided that, if a Chinese person or one of that descent was "convicted and adjudged to be not lawfully entitled to be or remain in the United States," he should "be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States."

Wong Wing, a Chinese person (there were others arrested but for the purpose of convenience of reference we treat the case as being against him only), was arrested and taken before a Commissioner of the Circuit Court for the Eastern District of Michigan and adjudged to be unlawfully within the United States and not entitled to remain therein. It was also adjudged that he be imprisoned at hard labor at and in the Detroit House of Correction for the period of sixty days.

The court, considering the statutes, said they operated on two classes—one which came into the country with its consent, the other which came in without consent and in disregard of law, and that Congress had the constitu-

tional power to deport both classes and to commit the enforcement of the law to executive officers.

This power of arrest by the executive officer and the power of deportation were sustained; but the punishment provided for by the act, and which was pronounced against Wong Wing, that is, imprisonment at hard labor, was decided to be a violation of the Fifth Amendment, he not having been proceeded against by presentment or indictment by a grand jury.

The court noted the argument and the cases cited and sustained the power of exclusion, but said that when Congress went further and inflicted punishment at hard labor it "must provide for a judicial trial to establish the guilt of the accused". And this because such punishment was infamous and prohibited by the Fifth Amendment, the conditions prescribed by the Amendment not having been observed. The necessity of their observance was decided, because, to repeat, imprisonment at hard labor was an infamous punishment. In sanction of the decision, *Ex parte Wilson*, 114 U. S. 417, 428, was cited and quoted from. The citation was in point. Both propositions were presented in that case, and both were decided upon elaborate consideration and estimate of authorities. See also *Mackin* v. *United States*, 117 U. S. 348, 350.

The United States urges against the *Wong Wing Case* that four years after its decision the question of the infamy attached to punishments came up for consideration and decision in *Fitzpatrick* v. *United States*, 178 U. S. 304, and that the *Wong Wing Case* was not referred to. The immediate answer is that a case is not overruled by an omission to mention it. Besides, it was based on *Ex parte Wilson* and that case was cited. The *Wilson Case* was elaborate in the exposition of the law—its evolution and extent. The various punishments or, we may say, the various imprisonments to which infamy had been ascribed were detailed, with citation of cases. In these were in-

cluded as certain, imprisonment in a penitentiary. But it was decided that the quality of infamy could attach to any imprisonment if accompanied by hard labor. It was said, and it was necessary to say, in passing on Wilson's situation, that "imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the provision of the Ordinance of 1787, and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished." In other words, it was declared that if imprisonment was in any other place than a penitentiary and was to be at hard labor, the latter gave it character, that is, made it infamous and brought it within the prohibition of the Constitution.

There is nothing in *Fitzpatrick* v. *United States* that gives aid to the contention which counsel make, that it is the place of imprisonment, that is, imprisonment in a penitentiary, which makes the infamy, the accompaniment of hard labor being but an incident. It is true in that case it was said that "the test is not the imprisonment which *is* imposed, but that which *may be* imposed under the statute." This manifestly was said to distinguish the character of the crime, as capital, and not to assign a quality to the punishment. To assign a quality to the punishment was a necessity in *Wong Wing* v. *United States* and in *Ex parte Wilson,* and it was responded to by discussions pertinent to it, and by decisions which were required by it. We can add nothing to the fullness of the discussions or their adequacy, and the decisions pronounced as their consequence we are not disposed to overrule. They necessarily determine, therefore, the present case and require the affirmance of the judgment of the Court of Appeals so far as it decides that the sentence upon Moreland was void because of the inclusion therein of the punishment of hard labor, he not having been presented or indicted by a grand jury. And because of their authority we do not review the cases cited by the United States nor consider that they can be modified in

accommodation to the practice that is said to exist of creating workhouses as places of punishment.

Some further comment becomes necessary. An attempt is made to modify the case or to remove it as authority for that at bar. The means and pains taken to accomplish it are somewhat baffling to representation. We have cited the case for the proposition that imprisonment with the accompaniment of hard labor is an infamous punishment, made so by the accompaniment of hard labor, and declared illegal because not upon presentment or indictment by a grand jury.

Doubt is cast upon our right to so cite it, and it is, in effect, asserted that the infamy of the imprisonment to which Wong Wing was sentenced was not constituted by the accompaniment of hard labor but was the attribute of the imprisonment, the Detroit House of Correction being, it is said, a penitentiary. And this is attempted to be established by the assertion of a fact extraneous to the opinion of the court and the record in the cause. It is true certain isolated sentences used by a Justice concurring in part and dissenting in part are referred to as to what the court must have implied.

The assertion calls for reply. We have relied on the case as authority and, regarding it as authority, we have naturally refrained from the idleness, or, as it may be said, the ostentation of general reasoning. We might, indeed, leave the case to speak for itself to those who may need to refer to its ruling and the ruling in the present case, but some comment, though it may not be necessary, is justified.

It is to be kept in mind that the case concerned the Constitution of the United States and necessarily had a purpose beyond its incident and time. Its precept became a part of the Constitution and in realization of this the court took care that the grounds of its decision were neither obscure nor uncertain. Its opinion demonstrates this, and that there was no misunderstanding of the points

of counsel nor ambiguity in passing upon them. What was not in controversy, of course, received no attention, and the infamy of imprisonment in a penitentiary was not in controversy; that was of universal acceptance then, as now, and an intimation of its existence would have been enough to have caused Wong Wing's delivery from custody on the instant; nor would the United States have resisted. There was in controversy, however, the question whether imprisonment in any prison or place, at hard labor, as a sentence for crime, was infamous. Upon that counsel were in opposition, and it was submitted for decision. The court contrasted the contentions.

Wong Wing's was recognized as a claim that his sentence to imprisonment at *hard labor* inflicted an infamous punishment and hence conflicted with the Fifth and Sixth Amendments of the Constitution of the United States, he not having been presented or indicted by a grand jury.

"On the other hand," the court said, "it is contended on behalf of the Government that it has never been decided by this court that in all cases where the punishment may be confinement at hard labor the crime is infamous, and many cases are cited from the reports of the state Supreme Courts, where the constitutionality of statutes providing for summary proceedings, without a jury trial, for the punishment by imprisonment at hard labor of vagrants and disorderly persons has been upheld."

The comment was an anticipation of some things that are urged in this case. At any rate, the contrast of contentions shows unmistakably upon what the court's decision was invoked,[1] and, while it decided, as we have seen,

[1] We may quote, in corroboration, that even the concurring Justice said the question involved was whether a Chinese person could "be lawfully convicted and sentenced to *imprisonment at hard labor* for a definite period by a commissioner without indictment or trial by jury." The italics are the Justice's and we copy their emphasis as it demonstrates that the fact of *hard labor* was that which determined the case.

that the Commissioner had power under the Act of 1892 to order Wong Wing deported and to sentence him to imprisonment, Congress could not legally invest the Commissioner with power to make hard labor an adjunct of the imprisonment. It was, in effect, said that the adjunct made the imprisonment infamous and beyond the power of legislation to direct without making provision "for a judicial trial to establish the guilt of the accused." Wong Wing was, therefore, discharged from custody.

That the place of imprisonment was not considered either pertinent or determinative is established by the fact that the Detroit House of Correction was not a penitentiary nor regarded as such. It was, and is, what its name implies—a place of correction and reformation; not of condemnation to infamy and, it might be, to a perpetual criminal career. Howell's Mich. Stats. Anno., 2nd ed., c. 430, p. 5915, *et seq.;* Mich. Laws 1861, p. 262, Act No. 164; Compiled Laws of Mich. 1897, c. 76.

It is an institution of the City of Detroit and the act creating it designated its use to be "for the confinement, punishment and reformation of criminals or persons sentenced thereto. . . ." How this use is regulated and its purpose accomplished are detailed in too much legislation to be reproduced. The House of Correction stands in a unique relation to the state prison and while it may under circumstances, and in the discretion of a condemning court, be a place of imprisonment for offenders that might be committed to the state prison, yet always it is kept distinct from the state prison. It does not, therefore, make its use as a place of confinement for other offenses a penitentiary with its attachment of infamy. Its purpose is reformation, instruction in conduct, and diversion from a criminal career To make it, therefore, a penitentiary would defeat the purpose of its creation.

We have dwelt on this matter at length because we think more is involved than the power to deport aliens, or

to punish them for illegal entry into the country—more than to deliver one from punishment who has defied the orders of a court, that enjoined upon him the manifest duty of supporting his minor children. It concerns the recognition and enforcement of a provision of the Constitution of the United States expressing and securing an important right. And the right, at times, must be accorded one whose conduct tempts to a straining of the law against him.

The ultimate contention of the United States is that the provisions of the Act of March 23, 1906, for punishment by fine or imprisonment are severable, and that, therefore, it was error in the Court of Appeals in holding the act unconstitutional to direct the dismissal of the case instead of sending it back for further proceedings.

The contention is untenable. It is what sentence can be imposed under the law, not what was imposed, that is the material consideration. When an accused is in danger of an infamous punishment if convicted, he has a right to insist that he be not put upon trial except on the accusation of a grand jury. *Ex parte Wilson* and *Mackin* v. *United States, supra.*

Judgment affirmed.

MR. JUSTICE CLARKE took no part in the consideration and decision of this case.

MR. JUSTICE BRANDEIS, with whom concurs MR. CHIEF JUSTICE TAFT and MR. JUSTICE HOLMES, dissenting.

On January 18, 1921, an information, under the Act of March 23, 1906, c. 1131, 34 Stat. 86, was filed against Moreland in the Juvenile Court of the District of Columbia for wilfully neglecting to provide support for his minor children—girls aged eight and thirteen. He was tried by a jury and found guilty. The court suspended sentence and ordered him to pay each month for their

support the sum of thirty dollars. Having failed to make any payment under this order, Moreland was sentenced on April 19, 1921, to be committed to the workhouse at hard labor for six months, the superintendent to pay to the mother for the support of the children fifty cents for each day's hard labor performed by him. Moreland had insisted that the offense with which he had been charged was an infamous crime, since the statute prescribes as punishment imprisonment at hard labor; and he claimed that rights guaranteed by the Fifth Amendment had been violated, because he had been made to answer to the charge without having been indicted by the grand jury. His claim was overruled by the Juvenile Court. Upon writ of error the Court of Appeals of the District, 276 Fed. 640, relying upon *Wong Wing* v. *United States*, 163 U. S. 228, reversed the judgment of the Juvenile Court and directed that the complaint be dismissed. The case came here on writ of certiorari. 257 U. S. 631.

The Fifth Amendment declares: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." Whether a crime is infamous within the meaning of the Fifth Amendment may be determined by the character of the punishment or by other incidents of the sentence prescribed. *Ex parte Wilson*, 114 U. S. 417, 426. In the *Wong Wing Case* the commitment was to an institution which was named the Detroit House of Correction, but served also as a state prison or penitentiary.[1] Im-

[1] It seems clear that the court had this fact in mind. In his concurring opinion Mr. Justice Field said, p. 241: "It does not follow that, because the Government may expel aliens or exclude them from coming to this country, it can confine them at hard labor in a penitentiary before deportation or subject them to any harsh and cruel punishment." In *Ex parte Wilson*, 114 U. S. 417, 428, strongly relied upon by the court, pp. 234, 237, 242, Mr. Justice Gray said: "For more than a century, imprisonment at hard labor in the State prison

prisonment in a state penitentiary is an infamous punishment whether it be with or without hard labor. *In re Claasen*, 140 U. S. 200, 205. Moreover, the commitment in the *Wong Wing Case* was not under sentence of a court or after conviction by a jury. It was by direction of a commissioner of the United States. The punishment by imprisonment was thus imposed under an executive order, and, hence, was clearly void under the Constitution, whatever its character or incidents, its duration or the place of confinement. The question here involved is different. It is whether the mere fact that the act prescribes hard labor as an incident of the sentence of confinement in the workhouse, renders the offence (which the statute describes as a misdemeanor) an infamous crime within the prohibition of the Fifth Amendment.

The Act of March 23, 1906, declares that any person in the District of Columbia who shall wilfully neglect to provide for his minor children under the age of sixteen in destitute circumstances, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment in the workhouse of the District at hard labor for not more than twelve months, or by both such fine and imprisonment. If a fine is imposed, the court may direct that it be paid

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or penitentiary or other similar institution has been considered an infamous punishment in England and America." In the *Wilson Case* the prisoner had been sentenced to the Detroit House of Correction for the term of fifteen years for having passed counterfeit bonds. In 1892, when Wong Wing was sentenced, there were about 1700 United States prisoners, other than those serving jail sentences, who were confined in about sixty state and territorial institutions. The institution having the largest number, 432 on July 1, 1892, was the Detroit House of Correction, these prisoners having been received from various districts in the south and west, as well as from the Michigan districts. Reports of Attorney General: for 1891, p. XI; for 1892, pp. X, 270, 272. See Michigan Compiled Laws, 1897, §§ 2165, 2176, 2179–81, 11985.

to the wife or other person in whose care the children are. If the father is confined to the workhouse, the superintendent is required to pay toward their support a sum equal to fifty cents for each day's hard labor performed by him. Either before trial or after conviction the father may be released upon giving recognizance for the payment of a weekly allowance for the support of the children. These provisions may be enforced by proceedings in the Juvenile Court, Act of June 18, 1912, c. 171, § 8, 37 Stat. 134, 136; and if so, they are commenced by information. The accused is entitled to trial by jury, as the penalty which may be imposed for the offence charged is a fine of more than fifty dollars or imprisonment for more than thirty days. Act of March 19, 1906, c. 960, § 12, 34 Stat. 73, 75.

The workhouse of the District of Columbia is at Occoquan in the State of Virginia. It is an industrial farm of 1150 acres, bordering on the Occoquan River. On the farm, in healthful and attractive surroundings, are many small, well equipped buildings appropriate for the residence and occupation of the inmates. These are employed on the premises, partly in agricultural, partly in industrial, pursuits. In cultivating hundreds of acres of land and in clearing, from time to time, more; in fruit orchards and dairy; in chicken and hog raising; in brick manufacturing and stone crushing plants; in sawmill operations and a small shipyard; in the repair and construction of farm implements, of roads and of buildings required for the development of the institution; and in transporting its products by water or otherwise. The work is such as is ordinarily performed under favorable conditions on farms, in factories and in the mechanical trades; and it is not harder. The eight-hour work day prevails. There is a school, a library and a hospital. And there is no wall, cell, lock or bar to restrain the inmates. Nor are they subjected to a distinctive dress such

as marks offenders.[1] By § 934 of the Code of the District, persons sentenced by its courts to imprisonment for not more than six months may ordinarily be committed either to the workhouse or to the jail; if sentenced for more than six months and not more than one year, the commitment must be to the jail; if sentenced for more than one year, the commitment must be to a penitentiary. The dominant purpose of Occoquan is not punishment, but rehabilitation. The compulsory labor is in a larger sense compulsory education. In the case of those who are committed for non-support, it serves also the purpose of compelling the performance of a parental duty imposed by the common law.[2]

Confinement at hard labor in a workhouse or house of correction for periods of less than a year was a punishment commonly imposed in America in the colonial period, at the time of the adoption of the Constitution and since, for offences not deemed serious—that is, for delinquencies as distinguished from serious crimes. Thus by the Great Law of the Province of Pennsylvania of December 7, 1682, the penalty for clamorous scolding, railing or lying was three days' imprisonment in the house of correction at hard labor; for cursing, playing at cards or dice, and for the first offence of drunkenness, it was five. For stage plays, bull baiting and cock fighting, it was at least ten. And for dueling it was three months. The duty to establish such a house "for restraint, correction, labour and punishment" was imposed upon every county of Pennsylvania at the same time.[3] A similar

[1] Reports of Superintendent of the Workhouse, in Annual Reports of the Commissioners of the District of Columbia, 1911 to 1921, inclusive.

[2] See *Dunbar* v. *Dunbar*, 190 U. S. 340, 351–2; William H. Baldwin, Family Desertion and Non-Support Laws (Washington, D. C., 1904), p. 5.

[3] Charter and Laws of the Province of Pennsylvania, 1682–1700, edition of 1879, pp. 107–123, 192–208 (reënactment of 1693).

law had been enacted in Plymouth Colony in 1658;[1] in Massachusetts Colony earlier;[2] and like provision was made in other colonies.[3] By the Law of New York of February 9, 1788, c. 31, confinement in the house of correction at hard labor was prescribed as the punishment for all disorderly persons. And those "who threaten to run away and leave their wives and children to the city or town" were classed as disorderly persons, with vagrants, beggars, idlers, fortune-tellers and common prostitutes. The period of imprisonment, limited ordinarily to sixty days or until the next general sessions of the peace, could be extended by the general sessions for a further period of six months. In the counties or cities in which there was no workhouse (bridewell) or house of correction, the jails were to be used and considered as such.[4] A single institution often served as almshouse, insane asylum, workhouse, house of correction and jail.[5] And under all of these laws commitment to the workhouse at hard labor was made by a judge, justice of the peace, or magistrate, without presentment or indictment of a grand jury.

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[1] Plymouth Colony Laws (Boston, 1836), p. 120.

[2] The Colonial Laws of Massachusetts (Boston, 1887), pp. 66 and 127.

[3] Acts and Laws of His Majesty's English Colony of Connecticut in New England in America (New London, 1750), pp. 204–207; Acts and Laws of the State of Connecticut in America (Hartford, 1786), pp. 206–210; Laws of the Colony of Delaware, 1753, c. CXLVI; Laws of the Colony of Maryland, 1766, c. XXIX, § XV; Laws of the State of Maryland, 1811, c. 96.

[4] Jails were used mainly as places for detaining prisoners awaiting trial and for confining poor debtors. Committal to a jail as punishment was comparatively rare, except for religious or political offences, in many of the colonies. H. E. Barnes, The Historical Origin of the Prison System in America, XII Journal of Criminal Law and Criminology, 35, 36.

[5] See Statutes of Connecticut and Maryland cited in note 3, *supra*. Barnes, History of Penal Institutions of New Jersey, pp. 48–51.

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Confinement at hard labor in a workhouse or house of correction did not imply infamy. Workhouses were not open to the reception of felons. Besides being refuges, they were in purpose correctional institutions in a true sense of those words. They were deemed training schools in which bad habits were to be eradicated and good ones formed. The medium of instruction adopted was regular, hard, productive work. The labor which inmates were required to perform was not imposed as punishment or as a means of disgrace. Nor was the confinement imposed primarily as punishment. That was administered rather by the whipping "not exceeding ten stripes" to which by some laws the newcomer was subjected on entering the institution.[1] The proceeds of the labor were deemed, in large part, payment for maintenance. But often part of the earnings were reserved for the inmate or were ordered to be paid for the support of his family.[2] It thus appears that the wilful neglect to provide for wife and children in destitute circumstances for which Congress sought to provide relief in 1906 was not a new social manifestation and that the method employed by it was not novel.[3]

It is not the provision for hard labor, but the imprisonment in a penitentiary which now renders a crime in-

[1] See Colonial Laws of Massachusetts (Boston, 1887), p. 127.

[2] By the Connecticut laws, which applied to a range of social delinquents as comprehensive as those of Pennsylvania and New York, it was provided that if the persons committed were "heads of families, then, and in such case, the whole profit and benefit of their labours, or so much thereof as the County Court of the county where such persons are committed shall think necessary, and direct; shall be for the relief, and support of their families." Acts and Laws of His Majesty's English Colony of Connecticut in New England in America (New London, 1750), p. 206.

[3] Nor was it then unusual. See William H. Baldwin, Family Desertion and Non-Support Laws (Washington, D. C., 1904).

famous. Commitment to a penitentiary, with or without hard labor, connotes infamy, because it is proof of the conviction of a crime of such a nature that infamy was a prescribed consequence. Confinement in a penitentiary is the modern substitute for the death penalty and for the other forms of corporal punishment which, at the time of the adoption of the Fifth Amendment, were still administered in America for most of the crimes deemed serious.[1] It was then believed that even capital punishment should be inflicted under conditions involving public disgrace. Largely for this reason hangings were public; as in earlier days men had been drawn and quartered. If the life of an offender was spared, it was then thought that some other punishment involving disgrace must be applied to render his loss of reputation permanent. When in 1786 Pennsylvania, shrinking from the physical cruelties inflicted under sentence of the courts, took the first step in reform by substituting imprisonment for death, as the penalty for some of the lesser felonies, the exposure to infamy was still deemed an essential of punishment. The measure then enacted provided specifically that the imprisonment should be attended by "continuous hard labor publicly and disgracefully imposed." Hard labor as thus prescribed and prac-

[1] H. E. Barnes, The Historical Origin of the Prison System in America, XII Journal of Criminal Law and Criminology, 35. The then statutes of New York, for instance, recited sixteen capital crimes: treason, murder, rape, buggery, burglary, robbery of a church, breaking and entry, robbery of person, robbery and intimidation in dwelling houses, arson, malicious maiming, forgery, counterfeiting, theft of a chose in action, second offense for other felonies, and abetting any of the above crimes. The punishment, other than death, then prescribed for serious crimes were mutilation, cutting off the ears or nailing them to the pillory, branding, whipping, the pillory, the stocks and the ducking stool. Laws of the Colony of New York, 1788, c. 37, § 1, Greenleaf edition, 1792, vol. II, pp. 78, 79. Philip Klein, Prison Methods in New York, pp. 19-35.

ticed was merely an instrument of disgrace. The statutory direction was carried out by employing the convicts in gang labor along the public roads, chained by fetters with bomb shells attached and iron collars, with shaved heads, and wearing a distinctive infamous dress.[1] The demoralizing influence both upon the community and the convict of these public manifestations of disgrace was soon realized, and led, shortly after the adoption of our Constitution, to their discontinuance in Pennsylvania and to the establishment in Philadelphia of America's first penitentiary.[2]

Hard labor was not considered an essential element of the penitentiary punishment; and experience proved that it was in fact an alleviation. The most severe punishment inflicted was solitary confinement without labor.[3] Hard labor regularly pursued and productively employed had for two centuries been applied as a corrective measure in the effort to deal with social delinquents.[4] Then the belief spread that it might be effectively employed also in the reformation of criminals—a class of persons theretofore generally considered incorrigible. And when reform and rehabilitation of those convicted of serious crimes became a chief aim of the penal system, the dignity of labor was proclaimed and the practices of the workhouse

[1] Act of September 15, 1786, 12 Statutes at Large of Pennsylvania, p. 280, c. MCCXLI; Robert Vaux, Notices of the original and successive efforts to improve the discipline of the prison at Philadelphia, etc. (1826), pp. 8, 21, 22; William Crawford, Report on the Penitentiaries of the United States (London, 1835), pp. 8, 9.

[2] See Report of William Crawford on the Penitentiaries of the United States (London, 1835), p. 27.

[3] George Ives, A History of Penal Methods, p. 174.

[4] The law of Connecticut (see note 3, p. 446, *supra*,) was entitled "An Act for restraining, correcting, suppressing, and punishing rogues, vagabonds, common beggars, and other lewd, idle, dissolute, profane and disorderly persons, and for setting them to work."

were adopted and developed in the penitentiary.[1] Thus hard labor, which, in inflicting punishment for serious crimes, had first been introduced as a medium of disgrace, became the means of restoring and giving self-respect.

The purpose of the Fifth Amendment was stated by Chief Justice Shaw in *Jones* v. *Robbins*, 8 Gray, 329, 347–349; and his statement was quoted with approval by this court in *Ex parte Wilson, supra,* p. 428. It was " to make a marked distinction between crimes of great magnitude and atrocity, and to secure every person against accusation and trial for them without the previous interposition of a grand jury," but " to leave minor and petty offenses to be prosecuted without these formalities ". Imprisonment in a penitentiary where the convict is (or used to be) " subject to solitary confinement, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline " is a punishment deemed infamous; but commitment to a " house of correction, under that and the various names of workhouse and bridewell ", although some of the incidents of the confinement are identical, " has not the same character of infamy attached to it." There is thus no basis for the contention that sentence to hard labor as an incident of confinement necessarily renders a punishment infamous, or that commitment to a workhouse at hard labor can be made only upon indictment by a grand jury. This court did not hold in *Wong Wing* v. *United States,* nor has it, heretofore, ever decided or stated, that commitment to a workhouse at hard labor is an infamous punishment. The confinement in the *Wong Wing Case* was in an institution used as a

[1] H. E. Barnes, Historical Origin of Penal Institutions, XII Journal of Criminal Law and Criminology, 35, 37; F. H. Wines, Punishment and Reformation (1919 ed.), c. VI; Philip Klein, Prison Methods in New York, c. VIII.

state prison or penitentiary and the expression in the opinion concerning imprisonment at hard labor must be understood as referring to such.

But even if imprisonment at hard labor elsewhere than in a penitentiary had, in the past, been deemed an infamous punishment, it would not follow that confinement, or rather service, at a workhouse like Occoquan, under the conditions now prevailing should be deemed so. As stated in *Ex parte Wilson,* 114 U. S. 417, 427, and in *Mackin* v. *United States,* 117 U. S. 348, 351: "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another." Such changes may result from change in the conditions in which, or in the purpose for which, a punishment is prescribed. The Constitution contains no reference to hard labor. The prohibition contained in the Fifth Amendment refers to infamous crimes—a term obviously inviting interpretation in harmony with conditions and opinion prevailing from time to time. And today commitment to Occoquan for a short term for non-support of minor children is certainly not an infamous punishment.